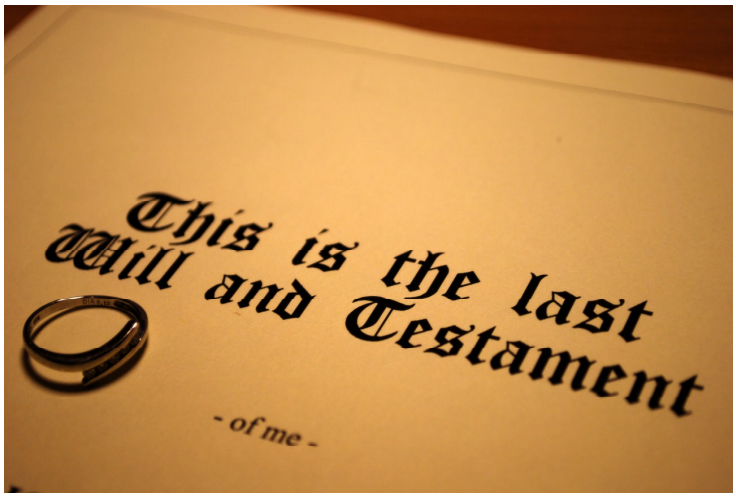
Why Should I Make A Will?

A Public Information Leaflet



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Why you should make a will

MAKING A WILL is the only way to ensure that your wishes are carried out after your death. If you have not made a valid Will, your property will pass according to the rules of Intestacy. This may not be what you would have wished. In any event it is likely to take longer to finalise than if you had made a valid Will. During this time your beneficiaries may not be able to draw any money from your estate. It can mean arguments and distress for your relatives. Making a will lets your loved ones know that you cared enough to 'sort things out' in advance.

IF YOU are a single person you may wish for your estate to be distributed amongst friends; relatives; charitable bodies or institutions of your choice and in the proportions as specified by you.

IF YOU are married or in a civil partnership do not presume that your other half will get everything. Your siblings or parents may have a claim against your estate. Often, your children will have a right to part of your estate. If you are living as an unmarried couple you could be treated as a single person with your surviving partner receiving nothing at all. One thing you can be certain of - there will be arguments and disputes at a time when the family should be coping with the loss of a loved one.

IF YOU are a parent, you may wish to consider who would look after your child/children in the event of your death. This is particularly important for single-parents and unmarried fathers without parental responsibility (PR) for births prior to December 2003. A valid Will nominating guardians is invaluable in such cases. If no one knows what you would have wanted, the Court will decide on the future of your children, and it may not be what you would have wished.

IF YOU have retired maybe you made a Will a long time ago. It probably needs updating to include additional grandchildren or deletion of persons whom you no longer wish to leave anything to.

A Will brings security reassurance and above all peace of mind - not just for you, but for all those who depend on you, either now or in the future.

Making Your Will

Having taken the decision to make your Will, possibly for the first time, there are a few points you should consider before committing yourself to an appointment with a professional Will Writer.

The Consultants job is to take your instructions and translate these into your Will, creating a document which accurately reflects your wishes.

The Will needs to be understood by your executors and most importantly, The Probate Court, to ensure that it is proved quickly to minimise any problems which may occur causing delays and possible hardship to your loved-ones.

There are some important questions which you need to consider before meeting with your Consultant. By having many of the answers available it will leave more time to discuss the other important issues which may arise during the consultation.

1. THE APPOINTMENT OF EXECUTORS AND TRUSTEES.
You do not need to appoint other 'professionals' to act as an executor or trustee of your estate unless there is the likely hood of a Trust arising. It many cases it would be sufficient appoint your spouse or partner together with a member of your family, a prime beneficiary or close friends to act, remember:

AN EXECUTOR CAN ALSO BE A BENEFICIARY

If you do need to appoint a professional executor, you could consider appointing a trust corporation, such as the SWW Trust Corporation or a solicitor to act on your behalf. Your consultant will be able to advise you on the best choice given your circumstances and give a guide to the fees they are likely to charge.

2. APPOINTMENT OF GUARDIANS

Only if you have minor children (under the age of 18 years) will you need to appoint guardians.

It may be helpful to make at least one guardian a joint executor, they do have a right to money from your estate to help towards the cost of bringing up your children. If you wish to restrict the amount to which they are entitled, it may be wise to leave the money in trust, again your consultant will be able to advise on the suitability of such a scheme. One should always remember though that trusts can be expensive to administer, particularly over a long period.

If you have disabled children who are likely to require specialist care either at home or in the care of the Local Authority, a trust will be required to ensure that adequate funds are available for their future. There are several Trust Companies run by charities which can help, the Society can give you individual advice in these circumstances.

3. PROPERTY

How you hold your property will determine how it passes on your death. As ‘Joint Tenants’ your share will pass to the survivor automatically and cannot pass by your Will.

If you wish to pass your ‘interest’ in the property to your children or others, you should hold your property as ‘Tenants in Common’. Your consultant will advise you on how this can be done; by holding your property as tenants in common you are free to dispose of your individual shares via your Will and to who you wish.

‘Severing a joint tenancy’ as it is called can protect part of your estate from the unforeseen, such as protecting your share of your estate should your spouse or partner marry or remarry after your death, or should you or your spouse or partner go into full time residential care.

4. OTHER CONSIDERATIONS

Specific Gifts - decide now if you wish to leave any other members of your family or friends a special gift.

Pecuniary Legacies - this is the term for a gift of money, again give some thought as to anyone, other than your spouse or children, who you may wish to leave a legacy to, this also can include gifts to your favourite charity (if a charity try and have the address and registration number available).

Residuary Legacy - this covers all the remainder of your estate, and in the case of a married couple passes ‘each to each other’ and then on to any children in equal shares upon the death of the survivor.

Long Stop - also described as the ‘total calamity or disaster’ clause, so called because these beneficiaries will only inherit if all those named as your residuary beneficiaries fail to survive you.

Funeral Wishes - you may choose to ignore this section. For those that wish to leave specific instructions, such as cremation or burial and whether flowers or donations are to be given, you should complete this section. It must be pointed out that whatever your request, these are only a wish and not binding on your executors to carry them out if they are unable to.

AND FINALLY - whatever you have put in your Will - and it is personal only to you - make sure that your executors can find it when the time comes. Tell them where you keep your Will and how they can get access to it.

Why property is yours to give by will

Giving your instruction
When preparing to make your Will you first need to know what you own, what it's worth and what you owe.

But before you do this it is important to understand the rules governing property ownership. The principle reason for knowing this is that you cannot leave property that you do not own.

If you are single, have no minor children and own all your property outright, with no shared ownership, you will have little problem. You are free to leave your property to whoever you wish and to whatever institutions you wish.

However if you own any property in shared ownership - such as joint ownership or ownership in common - you will need to understand how this affects your right to give away this property by your Will.

Joint ownership
Where property is held by more than one person as JOINT OWNERS in equity on the death of one joint owner his interest automatically passes by survivorship to the surviving joint owner(s).

Jointly owned property will pass to the survivor no matter how short the period of survivorship may be and despite anything said to the contrary in the Will. For this reason it may be appropriate to sever (split) a joint ownership *inter vivos* (during lifetime) see Ownership in Common.

Apart from the obvious, the family home, some other types of property pass on death independently of the terms specified in the Will.

These include nominated property, Life Assurance Policies, Pension and Death in Service Benefits, Joint Bank accounts.

Ownership in common

Where land or property is held by more than one person as OWNERSHIP IN COMMON, the share of each co-owner in common passes on his death under his Will or intestacy.

Each owner in common is free to leave his beneficial interest (his share) to whoever he wants, however this can cause problems for the survivor particularly in the case of the matrimonial (or family) home.

The surviving spouse/civil partner/unmarried partner could be forced to sell the property to settle the gift entitlement to the beneficiary. A simple solution to this is to give the survivor a 'life interest' in the property, enabling them to remain living in the house as long as they wish or for the remainder of their lifetime . It is only when the survivor dies that the intended named beneficiary in the Will can benefit and take the gift of the house (or the proceeds of the sale).

Severing an ownership agreement

To sever a joint ownership to ownership in common requires one party to notify the other as to their intention to do so, with the other party/parties signs in agreement.

Both (or all) co-owners sign a Notice of Severance of Joint Tenancy, in effect notifying each other (or all co-owners) of the intention to sever the existing ownership status.

Where the property is subject to a mortgage or other loan, the mortgagee (lender) should be notified and the severance registered on the deeds through the local Land Registry Office.

Your Will Writer will be able to advise you further on the action that you need to be taking and many will undertake to complete the entire procedure on your behalf as part of their service.

Appointing Guardians & Parental Responsibility

Appointment of Testamentary Guardians

The appointment of guardians and the rights they have are governed by the Children Act 1989, s5. A guardian can only be appointed in accordance with that section. A parent with parental responsibility may appoint a guardian by Will or by a document which he dates and signs and which provides that the appointment only takes effect on his death.

The appointee will become the child's guardian if, at the death of the testator:

A. no parent with parental responsibility survived him; or
B. there was a residence order in his sole favour relating to the child.

If neither of these conditions is fulfilled, the appointee will not automatically become the child's guardian but, as he has parental responsibility, he will be entitled to apply to the court to be appointed guardian.

Where a testator has children under the age of 18, the appointment of testamentary guardians should always be considered. The expression 'testamentary guardian' merely indicates that the guardian has been appointed by Will.

It is usual (but not essential) that the same persons are appointed guardians of all the testators minor children. When the guardians are to act only after the death of the surviving parent it is desirable that each parent should appoint the same persons to act as guardian.

It is, of course, important that the testator should obtain the consent of the proposed guardian before making the appointment. The appointed guardian can appoint a successor. It is, however, unnecessary to make express provision in the Will because the Children Act 1989, s5(4) enables a guardian to appoint another individual to take his place in the event of his death.

Whether guardians should be trustees depends on the circumstances of each case. There are arguments for and against. The guardians are best placed to know the needs of the children and have the task of providing for those needs. On the other hand, the guardians may be regarded as the advocates of the children and the trustees as the judges of their conflicting claims. The problem is particularly acute when the residue is held on discretionary trusts for the children and, in that case, a sensible solution may be to appoint one of the guardians and, say two professional trustees.

Parental Responsibility

Without prompting, clients rarely contemplate the appointment of testamentary guardians. But they constantly accept that such an appointment is highly desirable if both parents are to die before their child is eighteen.

Section 2 (1) of the Children Act 1989 provides that where a child's mother and father were married to each other at the time of the child's birth, they both have automatic parental responsibility for that child. (Same applies to children born as a result of AID) If the parents aren't married the father can apply for parental responsibility through the court and be granted a order, agreement with the mother which has to be signed and witnessed in court or via a residence order.

If the father has already acquired a parental rights and duties order under the Family Reform Act 1987, this will automatically be deemed to be an order under the Children Act 1989.

In 2003 the Children Act was reformed. The parents of the child no longer had to be married to both have automatic parental responsibility for the child. Both the father and the mother just have to be named on the child's birth certificate. You can choose to legitimate the child by later getting married.

Guardians, a person with a residence order, adopters and local authorities where a care order or emergency protection order is in force can all acquire parental responsibility.

Section 5 of the Children Act 1989 confirms that the court can appoint guardians for a child. This is only if the child has no parents with parental responsibility or a parents/guardian with a residence order. (The court can also only appoint a guardian if the parents with parental responsibility or the guardian with a residence order dies subsistence of the order).

A parent with parental responsibility or a guardian can appoint other(s) to act as guardian in the even of their death such appointment must be in writing , dated and signed by the maker or, where not signed, signed at his direction and duly witness. S5(5) goes on to provide for the circumstances in which the appointment of the guardian may be revoked or disclaimed.

NOTE:

1. More than one person may have parental responsibility for the same child at the same time
2. Where more than one person has parental responsibility for a child, each person may act independently without the other(s) in discharging that liability. This power is subject to any statute requiring the consent of more than person in any matter affecting the child
3. The fact that a person has parental responsibility for a child does not entitle him to act in a way incompatible with any order made in respect of the child under the 1989 Act
4. Though a person who has parental responsibility may not surrender or transfer any part of it to another, he may arrange for some or all of it to be met by one or more persons acting on his behalf. A person acting on his behalf may already have parental responsibility for the child. An arrangement will not affect any liability the person making it may have as a result of failing to meet any of his parental responsibilities for the child concerned.

Signing your will

Your Will becomes a legally valid and binding document as soon as it has been signed correctly.

Your signature must be witnessed by two people who must be present with you as you sign.

Witnesses MUST NOT BE BENEFICIARIES OR MARRIED TO A BENEFICIARY. Nobody who may benefit from your Will can be allowed to act as a witness. If this happens any legacy or benefit they may have received will be LOST and become part of the remaining estate.

The witnesses are only confirming that it is your signature - they do not need to read the Will and all other clauses can be covered up if required.

Witnesses should also be sure that you know what you are doing - they must be confident that you have READ your Will and that you are SOBER and of SOUND MIND.

Witnesses are also confirming that the signature is YOUR CHOICE - there must be no question of any outside influence persuading you to sign.

Your witnesses should be aged 18 or over and be UK citizens.

Signing with Testators who are BLIND or INFIRM requires special arrangements and additional instructions can be supplied in such cases.