WILLS

Law guide – How to draft your will (Part II)

Contents

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Formalities for making a Will

Formalities

There are formalities involved in making a Will which a testator (a person who makes a Will) will need to consider.

There are five requirements:

1. The Will must be in writing.
2. The Will must be signed.
3. The testator must intend by his or her signature to create the Will.
4. The testator's signature must be made, or acknowledged (see below), in the presence of two independent witnesses.
5. The witnesses must sign in the presence of the testator.

In writing

There are no restrictions as to the materials on which, or by which, a Will may be written, or as to what language may be used. It may be handwritten or typed, or be a combination of both (e.g. printed forms with spaces that are completed in the testator's handwriting).

Pencil or ink may be used but where a combination of both is used, there is a presumption that the testator had not yet formed a definite intention with respect to the parts written in pencil.

While there are few restrictions, as a matter of good practice, it is strongly recommended that a Will is written in ink or typed/printed on durable paper.

Signed

In addition to a signature, a Will may be signed by the testator by marking it in some way intended by him or her as his or her signature. Initials, a stamped signature, a mark such as a cross, an inked thumb mark, or a mark of any shape are all sufficient if intended by the testator as their signature.

This is useful for those, for example, who have a physical disability. Where, however, a testator is able to sign their name it is strongly recommended that they do so rather than use a mark.

A Will may be signed by some other person (including one of the witnesses) on the testator's behalf as long as they do so in the testator's presence and at his or her direction.

If a Will is more than one page long all the pages should be attached in some way at the time it is signed; and to reduce the risk of fraud or accidental loss it is recommended that the pages

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are securely attached by, for example, using a binding machine which are generally available in most print shops.

The signature or mark does not have to appear at any specific part of a Will, although typically it will be placed at the end.

Intention to give effect to Will

It is not necessary that such intention appear from the Will itself but the use of an 'attestation clause' (see further below) can assist in showing that a testator intended by his or her signature to give effect to his or her Will.

In the presence of two witnesses

The signature of the testator must be made, or acknowledged (see below), by the testator in the presence of two witnesses who are present at the same time.

The witnesses need not know that the document is a Will.

For a signature to be made in the presence of the witnesses, it is sufficient that the witnesses see the testator in the act of writing his signature (even if they do not see the signature and do not know what the testator is writing).

For a signature to be acknowledged in the presence of the witnesses, there are three requirements:

1. The Will must already have been signed before acknowledgement.
2. At the time of acknowledgement the witnesses must see the signature or have the opportunity of seeing it.
3. The testator must acknowledge the signature by his or her words or conduct.

There are restrictions on who may act as a witness. Blind people and people without mental capacity may not witness a Will.

It is important to note that beneficiaries under a Will (or their spouses/civil partners) should not witness a Will, as they would lose all benefits under the Will if they do so.

Witnesses sign or acknowledge

Each witness must sign (or acknowledge their signature) in the presence of the testator, but they do not need to sign (or acknowledge) in one another's presence.

The testator must be mentally, as well as physically, present: the Will is invalid if the testator loses mental capacity before both witnesses have signed.

The testator must either see each witness sign or have the opportunity of doing so if he or she has chosen to look or is not blind.

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Presumption of due execution

A Will may be presumed to have been properly signed where there is no evidence to suggest otherwise.

This can be particularly important where the witnesses are dead or cannot be traced.

Attestation clause

An attestation clause is a clause in a Will that explains the circumstances in which the Will was signed and witnessed.

Such a clause is not required but is highly desirable because it can ease the process of obtaining a grant of representation (all LawOnline Wills include this clause). A grant of representation is basically a permission from the Probate Office to your executors that they can proceed to deal with your estate after your death.

In the absence of an attestation clause, the probate office will require an affidavit to be produced evidencing that the Will was properly signed. Further, an attestation clause raises a stronger presumption that the Will was properly signed than if no such clause is present.

Incorporation of documents

A document can be made part of a Will ('incorporated') even though it is separate from the Will itself and has not been signed in the way that a Will is required to be signed.

There are three requirements for a document to be incorporated by reference:

1. The document must be in existence when the Will is signed (also if the document comes into existence after the Will is signed, but before any codicil is signed which confirms the Will, this requirement is also deemed to have been satisfied because the Will is treated as having been re-signed at the time the codicil is signed).
2. The Will must refer to the document as being already in existence when the Will is signed.
3. The document must be sufficiently described in the Will to enable it to be identified.

An incorporated document operates as part of the Will and is subject to the ordinary rules (such as lapse and ademption) applicable to Wills.

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Losing a gift

Where a person leaves a specific gift, for example, to a relative, friend or charity, but it is not properly described and cannot be identified, or the gift is not in existence at the date of death, the relative, friend or charity may well lose the gift.

Uncertainty

A gift may fail for uncertainty if the property cannot be identified from the description in the Will. For example, if the testator (someone who makes a Will) gives the beneficiary 'a ring' and it is subsequently found that there are a number of rings and there is no description as to which ring has been given to the beneficiary. The gift will thus fail if it cannot be identified and will form part of the residue (what is left over) of the estate.

A gift may also fail if the beneficiary is not properly identified. This applies both to individuals and organisations.

Not meeting requirements

Where a gift is subject to a condition, it will not only fail if the beneficiary dies before the testator, but will also fail if the beneficiary dies after the testator but before fulfilling a specific condition. The most common situation that arises is where the testator leaves a gift to a child subject to the child reaching a particular age. If the child does not reach the specified age the gift will fail, unless it is protected by a clause leaving the gift to another person or persons (e.g. grandchildren) in the event that the first intended beneficiary predeceases the testator.

Lapse

If the beneficiary of a gift dies before the testator the gift will lapse. In these circumstances, the general rule is that the gift falls into the residue and does not form part of the beneficiary's own estate. This is referred to as 'the doctrine of lapse'. If the gift is of the residue of the estate, the gift will be distributed under the intestacy rules unless an alternative residuary beneficiary has been named in the Will.

There are exceptions to the doctrine of lapse and the exception that applies most commonly in practice covers gifts to children of the testator (see below).

A gift will not lapse if the beneficiary can be shown to have survived the testator, for however short a period, unless inheritance is expressed as being conditional upon the beneficiary surviving the testator for a certain period of time.

If the deaths of the testator and beneficiary occur close together in time it is important to establish the order in which those deaths take place. If two people die together (for example, in a car accident) and there is no evidence of the order of their deaths, the normal rule is that the younger is deemed to have survived the older.

Gift over clauses to prevent the lapse of a gift

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A testator should consider including, what is called, a 'gift over' clause in respect of all bequests in a Will as there is always the risk that a beneficiary may predecease them. A gift over clause essentially provides for a gift to be made to a second beneficiary if a certain event occurs such as the death of the first beneficiary.

In particular relation to gifts to children section 98 of the Succession Act 1965 says:

> *'Where a person, being a child or other issue of the testator to whom any property is given (whether by a devise or bequest or by the exercise by will of any power of appointment, and whether as a gift to that person as an individual or as a member of a class) for any estate or interest not determinable at or before the death of that person, dies in the lifetime of the testator leaving issue, and any such issue of that person is living at the time of the death of the testator, the gift shall not lapse, but shall take effect as if the death of that person had happened immediately after the death of the testator, unless a contrary intention appears from the will'*

This relates to a situation where a testator leaves a gift to a child and that child dies before them leaving a child (the testator's grandchild) surviving at the date of their death. One would expect that the gift would pass to the grandchild but under section 98 this is not the case. The gift will pass instead into the estate of the deceased child and will be distributed in accordance with the terms of his or her Will if there is one or, if not, in accordance with the rules of intestacy.

Therefore, if it the intention is that the grandchildren receive the bequest of a child that may predecease, this needs to be specifically stated in the Will. This is called a 'gift over' clause.

Alternatively, the testator may be quite happy that the gift - a sum of money for example - falls into the residue if the beneficiary dies before them in which event there is no need to include such a clause in the Will.

If the wording in the gift indicates clearly that each beneficiary is to receive a specific share of the gift, if one of the beneficiaries dies the surviving beneficiary will take their share and the other share will either fall into residue, be subject to the intestacy rules if it is a gift of a share of residue or if there is a gift over clause, the substitute beneficiary will take that share.

Alternate residuary beneficiaries

To ensure as best you can that your residuary estate does not become subject to the rules of intestacy you can also nominate alternative residuary beneficiaries in case some or all of those you name in the Will as residuary beneficiaries die before you.

Divorce or civil partnership dissolution

If property or any interest in property is left to a spouse or civil partner and the parties divorce or dissolve their marriage or civil partnership after the making of the Will, the property or interest in property will not pass to the former spouse or civil partner unless the Will provides

otherwise. It is therefore important for a testator to consider this issue when preparing their Will.

A gift that is not yours to give

Where the gift is of specific property that the testator owns when he or she makes their Will and the testator disposes of that property during his or her lifetime, the gift will fail. This is because only that specific thing can be gifted. This is known as 'ademption' and the gift is said to be 'adeemed'. For example, the gift in the clause *'My yacht to my friend Niamh.'* in the Will of a testator who sold the yacht a few months prior to his death for €30,000 is said to have been adeemed. Unlucky Niamh cannot claim the €30,000.

Where the gift is of property that the testator did not own at the time the Will was made, it will not be adeemed. The property that is the subject of the gift will need to be provided out of the testator's general estate; for example, if a testator makes a gift of 4,000 shares in a quoted company, the executors of the estate will need to use money in the estate to purchase such shares, or sell other assets in the estate to raise money for this purpose.

The gift, however, even though it is not adeemed, may fail - for example, if (using the above example) the quoted company has ceased to exist by the time of the testator's death.

Problems also arise where the asset is not sold but has changed in nature. This happens most commonly with company shares. The company may have been taken over since the Will was made so that, on death, the testator owns the shares in a different company.

In each individual case it must be decided whether the asset has changed merely in name or form or whether it has changed in substance. Only if there has been a change in substance will the gift be lost. It is therefore extremely important in preparing the Will that a particular asset is clearly described and the testator must be aware of the risks should there be a substantial change in the asset.

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Inherited property

Inheriting a property with someone living in it

If you inherit part of a property and another owner is still living there, you can agree with them whether they will continue living there and under what terms (their right to remain may be set out in the Will) or whether the property will be sold. In the absence of an agreement, you can generally apply to a court to determine the issue.

If you inherit a property that has a tenant you have certain responsibilities as a landlord. Their legal rights will need to be taken into account if you wish to sell the property.

Registering the property in your name

Once the property passes to you, you should register your ownership of the property in the Land Registry by lodging the relevant forms for registration.

Taking on mortgage payments

If you inherit a property which has a mortgage you will be responsible for the monthly payments even if you do not live there. If the payments are not made the property could be repossessed and sold to pay off the mortgage.

If you inherit a property in a trust

A trust is a way of holding and managing money or property for people who may not be ready or able to manage it for themselves. If you are left property in a trust you are called the 'beneficiary'. The 'trustee' is the legal owner of the property. They are legally bound to deal with the property as set out by the deceased in their Will.

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Succession rights of spouses and civil partners

Legal right share

The provisions of the Succession Act, 1965 offers protection to the surviving spouse by giving them, what is called, a 'legal right share' in the estate of the deceased. Where a testator leaves a spouse and no children, the spouse has a right to one half of the estate. Where a testator leaves a spouse and children, the spouse has a right to one third of the estate (section 111 of the Succession Act, 1965).

A spouse's "legal right" has priority over any other bequests, although it may be renounced in writing at any time while the testator is still alive. A spouse who has deserted or committed a serious offence against the testator or his/her children loses the right to a share in the estate. The legal right may be extinguished by agreement or following a judicial separation and will disappear after a divorce.

A husband and wife's mutual rights to succeed to each other's estates may also be extinguished by the Court at any time on or after a decree of judicial separation, under the Family Law Act 1995. (Succession rights are automatically extinguished after a divorce, as the couple are no longer man and wife. Where a marriage is void, the partners are not spouses and these provisions also do not apply.)

The family home

If there is a family home which forms part of the estate, the surviving spouse or civil partner can retain the familyl home in full or partial satisfaction of their interest in the estate. This is known as the right of appropriation which may be exercised by a spouse or civil partner under section 56 of the Succession Act 1965.

Section 56 of the Succession Act 1965 states that:

> *where the estate of a deceased person includes a dwelling in which, at the time of the deceased's death, the surviving spouse was ordinarily resident, the surviving spouse may, subject to subsection (5), require the personal representatives in writing to appropriate the dwelling under section 55 in or towards satisfaction of any share of the surviving spouse.*

Thus a surviving spouse or civil partner who, at the time of the deceased's death, was resident in the family home can take this property, together with any chattels as part of any share to which they are entitled to. The executors must notify the surviving spouse of this right. A section 56 application cannot be exercised after six months from the receipt of such a notification or one year from the first taking out of representation of the deceased's estate, whichever is the later.

In view of the right to retain the family home, the PRs should not sell or otherwise dispose of the property until they inform the surviving spouse or civil partner of their right to appropriation under section 56 of the Succession Act 1965.

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Spouse or civil partner's right of election

Section 115 of the Succession Act 1965 states that where is a gift to a spouse or civil partner, the spouse or civil partner may elect to take either that gift or the share to which he or she is entitled as a legal right.

A spouse, in electing to take his or her share as a legal right, can take any bequest to him or her which is less in value than their full share in partial satisfaction of their right.

Where a person dies partly testate and partly intestate, a spouse or civil partner may elect to take either:

(a) his or her share as a legal right, or

(b) his or her share of two-thirds if there are children and all if there are none under the intestacy rules, together with any gift to him or her under the Will of the deceased.

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Family and dependants left out of the Will

When a person dies a surviving spouse or civil partner, any child of the family and certain cohabitants or other dependants, may apply to the courts in certain circumstances and request reasonable financial provision to be made for them from the estate where the deceased's Will does not make such reasonable financial provision.

When deciding to make a Will it is important to consider whether a particular person should be excluded who may ultimately have a claim against the estate. Depending on the circumstances it may be advisable to leave a gift to the particular person concerned. It is good practice for the testator (someone who makes a Will) to leave a Letter of wishes with the Will explaining why a particular person has been ignored or left a relatively small gift. This will not avoid a claim but it may, in some cases, assist the court in arriving at a decision as to whether a beneficiary is entitled to any provision.

A right to claim

An application must be brought within six months of the date of issue of the grant of representation to the deceased's estate. The court does, however, have discretion to extend this time limit. A grant of representation is basically a permission from the Probate Office to your executors that they can proceed to deal with your estate after your death.

Who can claim?

Claims can be made by:

1. a surviving spouse or civil partner
2. a former spouse or civil partner who has not remarried or entered into a new civil partnership
3. a child of the deceased, any person (other than a child of the deceased) whom the deceased treated as a child of the family in relation to a marriage or civil partnership to which the deceased was a party
4. any person who lived in the same household as the deceased in an intimate and committed relationship, and who is not related to the deceased within the prohibited degrees of relationship or married to or a civil partner of the deceased, for the two years up to death, if they have a child together, or the five years otherwise. Such individuals are known as ‘qualified cohabitants’.

Grounds for a claim

The only ground for a claim is that reasonable financial provision has not been made. The courts determine whether the testator failed in their moral duty to make proper provision for a person.

In respect of all categories, there are certain common guidelines that must be borne in mind when considering an application to the court for provision. These include, among others, the financial resources and needs of the applicant, the deceased's moral obligations towards the applicant or beneficiary, the size and nature of the estate, the physical or mental disability of any applicant or beneficiary, and anything else which may be relevant.

The court should take into account all the facts as at the date of the hearing and should have regard to the financial resources and needs of the applicant, their earning capacity, and financial obligations and responsibilities.

Surviving spouse or civil partner

In order to qualify as a surviving spouse, the person must be married to the deceased at the date of death. If the surviving spouse was married at the date of death but has since remarried when the application is actually heard, this is a factor that will be taken into account by the court in deciding whether an order should be made. Equivalent provisions apply in relation to civil partners.

The court will consider what financial provision would be reasonable in the circumstances for the spouse or civil partner in determining whether the deceased's Will has actually made reasonable financial provision for the spouse or civil partner.

In addition to the common guidelines, the court should also take into account certain special guidelines. They include the age of the applicant and duration of the marriage or civil partnership, and the contribution made by the applicant to the welfare of the family such as looking after the home. The court should also consider what the applicant might have received if the marriage or civil partnership had ended in divorce or dissolution rather than being terminated by death.

Former spouse or civil partner

This category is limited to a former spouse or civil partner who has not remarried or entered into a new civil partnership at any time prior to the hearing.

It is important to examine the divorce (dissolution in the case of a civil partnership) documentation, as very often a clause is included in a settlement agreement or consent order preventing a party to the marriage or civil partnership from bringing a claim in the event of a death. If such an order was made, the court cannot consider an application by the former spouse or civil partner.

The court should consider all the circumstances to establish whether reasonable financial provision should have been made for the applicant. What constitutes reasonable maintenance is difficult to define. It is more than mere subsistence but is unlikely to extend to a level covering everything that a person might want.

In addition to the common guidelines a court will also take into account special guidelines such as the age of the applicant, duration of the former marriage or civil partnership, and the

contribution made by the applicant to the welfare of the family including looking after the home.

Where the court accepts that provision should have been made for the former spouse or civil partner, it will often order periodic payments from the deceased's estate. The periodic payments will cease if the applicant remarries or enters into a new civil partnership.

Application by qualified cohabitant

A qualified cohabitant is defined by Section 172 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 as being an adult who lives in the same household in an intimate and committed relationship with another adult and who, immediately before the time that relationship ended, whether through death or otherwise, was living with the other adult as a couple for a period of 2 years or more, in the case where they are the parents of one or more dependent children, and of 5 years or more, in any other case. An application may be made by a qualified cohabitant of the deceased irrespective of whether the partner was being maintained by the deceased.

The above applies to same-sex couples as well as heterosexual couples.

Although the qualified cohabitant may bring a claim without having to prove maintenance by the deceased, reasonable financial provision may only be awarded to the extent that it is required for the partner's maintenance. The court should consider all the circumstances in respect of each application and can make awards such as periodic payments, a lump sum payment or transfer of property.

It should be noted that an inheritance received by a qualifying cohabitant under the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 is exempt from Inheritance Tax.

Application by a child of the deceased

Section 117 of the Succession Act 1965 states as follows:

> *Where, on application by or on behalf of a child of a testator, the court is of opinion that the testator has failed in his moral duty to make proper provision for the child in accordance with his means, whether by his will or otherwise, the court may order that such provision shall be made for the child out of the estate as the court thinks just.*

A child includes illegitimate, adopted and unborn children. There is no age restriction and, in itself, marriage will not affect a claim. Once again reasonable financial provision may only be awarded to the extent required for the child's maintenance. An adult child who is quite capable of working and looking after himself or herself is unlikely to succeed in a claim.

The common guidelines apply and in addition the court will consider the manner in which the applicant was being, or might expect to be, educated or trained.

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Application by a person treated as a child of the family

A stepchild can make an application under this category. The applicant must show that the deceased took on a parental role, which is more than showing affection and kindness.

Adults may apply under this category even if they are over the age of 18 when the deceased married their parent. As with the previous category, the test is whether reasonable financial provision for their maintenance has been made. The court is unlikely to entertain such an application where the person is able bodied and capable of looking after themselves.

Section 117 (2) of the Succession Act 1965 states that the court shall consider the application from the point of view of a prudent and just parent, taking into account the position of each of the children of the testator and any other circumstances which the court may consider of assistance in arriving at a decision that will be as fair as possible to the child to whom the application relates and to the other children.

A time limit of 12 months applies to such applications, from the first taking out of representation of a deceased's estate. The costs of Section 117 applications can often come out of the deceased's estate and therefore can reduce the value of gifts going to other beneficiaries, benefiting under the deceased's estate.

Once again, the court considers the common guidelines as well as certain special guidelines. They include:

- the manner in which the applicant was being, or might expect to be, educated or trained
- the extent of responsibility assumed by the deceased towards the applicant
- whether the deceased knew the child was not their own
- whether anyone else is legally responsible for the maintenance of the applicant and, if so,
- whether the natural parent pays maintenance under an existing court order

Children of a deceased civil partner

The legal right share given to civil partners, unlike that given to spouses, is not an absolute one. A child of a deceased civil partner can seek an order for provision from the estate where his or her deceased parent has failed in his or her moral duty to the child and this claim could reduce the legal right share of the surviving partner:

> *An order under this section shall not affect the legal right of a surviving civil partner unless the court after consideration of all the circumstances including the testator's financial circumstances and his or her obligations to the surviving civil partner is of the opinion that it would be unjust not to make the order.*

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Trusts

What is a trust

A trust is an arrangement under which property or other assets are held by one party for the benefit of another who is then called a beneficiary.

If you create a trust in a LawOnline Will the appointed executors automatically become the trustees. The trustees hold that property on behalf of the trust's beneficiaries and for their benefit, managing and distributing the assets and/or income in accordance with your instructions.

LawOnline Wills enable the creation of a number of types of trust (see below). Trusts created in a Will are called Will trusts.

A trust can result from making relatively simple wishes in your Will. For example, if you decide to make a gift to a child but specify that they cannot have the gift until they reach a certain age, then this condition results in a 'trust' being set up because your executors must hold the gift until the child reaches the required age. Equally gifts make to children under the age of 18 are held in 'trust' until they reach that age and can be given the gift.

Nature of a trust

When you create a trust, such as outlined above, you effectively 'trust' others (your trustees/executors) to make certain decisions having regard to all the circumstances that exist at the time they make their decision.

Depending on the nature of the gift and the circumstances they may need sufficiently wide and flexible powers to achieve your intentions (which LawOnline Wills provide). The extent to which the trustees are free to make decisions on which beneficiaries will benefit and to what extent depends on the type of trust you set up. A fixed interest trust, for example, gives the trustees little discretion whereas a discretionary trust gives them a wide degree of discretion.

There are also obligations imposed upon trustees by law in relation to their decisions and behaviour. By and large, you need not be unduly concerned about creating a trust provided that you approach the matter responsibly and seek advice if in doubt.

Guidance and control of trustees

The first fundamental point to note is that trustees have a duty to take reasonable care when exercising any of their functions. The second is that a trustee may not use trust property to make a profit for their personal benefit.

Depending on its nature managing a trust can require technical knowledge and experience. It is important also that the trustees understand the needs of your beneficiaries. A combination of professional (e.g. solicitors or a trust company) and family trustees is often

the best way to achieve this balance. An added advantage of appointing professional trustees is that they will carry professional indemnity insurance to meet any claims made against them if they fail to comply with their duties or are negligent in the way that they exercise their powers.

You should also prepare a document, often known as a letter of wishes, which records your wishes as to how your trustees should exercise their powers. These wishes are not binding on your trustees but they will have regard to, and be guided by, them. See the LawOnline document 'Letter of wishes' (WL001).

Overriding powers

The trustees have certain powers called overriding powers. These powers are what give your trustees the flexibility to achieve your intentions as, for example, you may have set out in a letter of wishes. These required powers are automatically given in a LawOnline Will to apply in the event that a trust is created.

Types of trusts

The following are the three types of trusts than can be set up in a LawOnline Will:

1. **Fixed interest trusts:** A fixed interest trust is where the share or interest of the beneficiaries is definite. For instance where parents set up a Will trust for their three children there is a definite number of identified beneficiaries. In this Will, a fixed interest trust is established if you decide to make a gift to someone which is only effective if and when they reach a certain age, and that person is under that age when you die.
2. **Interest in possession trusts:** Interest in possession trusts, broadly speaking, are those where a beneficiary is entitled to the income from the property held in the trust, or the use or enjoyment of such property, but is not entitled to the capital value of the property. These are sometimes referred to as life interest trusts where the beneficiary has the benefit of the property in the trust during their lifetime only. After their death, the property remains available, perhaps to the next generation as will be decided by your trustees based on your expressed wishes in, say, a letter of wishes. The most common form is the 'life interest trust' which is a trust that is created in this Will if you decide to leave your residuary estate to your spouse or partner for the extent of their life only.
3. **Discretionary trusts:** A discretionary trust is one where trust income and capital may be paid to one or more of a class of beneficiaries, as the trustees think fit. A discretionary trust is set up in this Will where you decide to leave your residuary estate to your spouse or partner for the extent of their life only. The discretionary trust only comes into being once the life interest trust (see above) ends with the death of the spouse or partner. On your spouse's or partner's death, your estate will be held on trust for the other beneficiaries, but whether or not an individual beneficiary benefits at all and, if so, to what extent is a matter that your trustees decide using their discretion and having regard to any guidance you have given or

wishes you have expressed. Similarly, if your spouse or partner dies before you, your estate is, on your death, held on trust for the other beneficiaries.

In LawOnline Wills, where you decide to leave your estate to your spouse or partner for life, a group or class of persons and organisations (known as your beneficiaries) are identified that may benefit under your Will, once your spouse or partner dies, but only as your trustees decide. Your beneficiaries include your partner and your children and grandchildren (and their partners) and any charitable organisation.

You can also select additional beneficiaries, such as remoter family (nephews, nieces, etc.) or ancestors. There is also the power for your trustees to add additional beneficiaries if at least 75% of your then existing beneficiaries agree.

Tax treatment

Trusts are subject to income tax, capital gains tax and capital acquisitions tax and either the trustees of the beneficiaries are responsible for payment of these taxes depending on the circumstances.

In broad terms if the income or gains remain in the trust, the trustees are responsible for paying any tax arising, while the beneficiary is generally liable if they have received the income, or gains, as the case may be.

Depending on the nature of the trust it may also be advisable to get professional taxation advice if you decide to use this Will to set up a trust.

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Dying without a Will

A person who dies without making a Will or without making a valid Will, dies intestate. The property belonging to such a person is inherited according to a strict set of rules commonly known as the Rule of Intestacy, which is governed by the Succession Act 1965. Instead of the property going to who might have been the testator's chosen beneficiaries, it is left to other relatives in a particular order.

Total intestacy

If a person dies without leaving a valid Will, they are said to die intestate. This occurs when the deceased never made a Will at all, revoked their Will and did not execute a new Will or because their Will was held to be invalid. When a person dies intestate, the Rules of Intestacy contained in Part VI of the Succession Act 1965 take effect.

Partial intestacy

A person dies partially intestate if they leave a valid Will, but the Will fails to dispose of all of the assets in their Estate

If, as is usual, the Will contains a valid residuary gift, a partial intestacy is avoided. A residuary gift is one which ensures that all the property which has not been specifically dealt with in the Will (the residue) passes to chosen beneficiaries nominated by the person making the Will (the testator).

Who gets the estate on intestacy?

The right of a person to benefit on intestacy depends on their relationship with the deceased.

Section 67 (1) of the Succession Act states, that if a spouse dies leaving no children, the surviving spouse takes the whole estate.

Section 67 (2) of the Act further states that if a spouse dies leaving a spouse and children, the surviving spouse is entitled to two thirds of the deceased's estate and the remaining one third of the estate is divided equally or *per stirpes,* i.e. does not inherit in an individual capacity but as a member of a group.

If all the children are in equal degree of relationship to the deceased the distribution shall be in equal shares among them; if they are not, it shall be *per stirpes.* Per stirpes means taking by right of representation; the group or class receives by representation and in equal shares what their deceased parent would have been entitled to receive.

For example, if one of your children predecease you and is the parent of three grandchildren, then the surviving child will receive a 1/2 share and each grandchild will receive a 1/6 share (in other words, the deceased child's 1/2 share will be divided equally among the three children who have survived the deceased child: 1/2 divided by 3 = 1/6 each).

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Example: If a deceased dies intestate, leaving a spouse and three children, the three children shall be entitled to a share of the remaining one third i.e. a one ninth share of one third of the deceased's estate.

Spouses and civil partners

Under the intestacy rules, a spouse is the person to whom the deceased was married at their death whether or not they were living together, or in the case of civil partners, were joined in a civil partnership under the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. Where the parties were divorced or are judicially separated the spouse will not benefit under the rules. The same applies where civil partners have dissolved their partnership.

Spouse or civil partner only

Where the intestate (someone who dies without having made a valid Will) leaves a surviving spouse or civil partner but no children, parent, brother or sister, or children of a deceased's brother or sister, the whole estate, however large, passes to the spouse or civil partner absolutely.

More distant relatives such as half brothers and sisters, grandparents and cousins are not entitled to any part of the estate.

Children

Children who benefit under the rules include all direct descendants of the deceased. That is children, grandchildren, great grandchildren etc. As mentioned above where the intestate dies leaving a spouse and children, the children take their one third share equally.

Adopted children or children born out of wedlock

Adopted children have the same rights as a natural born child of the adoptive parent. It should be noted, however, that once an adoption order is made that an adopted child ceases to be treated as a child of his natural parent(s). The Status of Children Act provides that any relationship between child and parent will be adduced irrespective of the marital status of the parents. Thus, the rules of intestacy are applied regardless of whether or not a particular individual's parents were married to each other.

No spouse or civil partner or children

Where there is no spouse or children, each parent takes a one-half share or, if only one parent is alive, that parent takes the full share.

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No spouse or civil partner, children or parent

Where a person dies leaving no surviving spouse or civil partner, issue or parent, all brothers and sisters take equally and the children of a predeceased brother or sister take per stirpes. The Succession Act also provides that where a person dies leaving no surviving spouse or civil partner, issue or parent, nor brother or sister, all nephews and nieces take equally.

Shares of next of kin

Where the intestate is not survived by a spouse, issue, parents, brother, sister, nephew or niece his or her estate will be distributed among his or her next of kin.

Next-of-kin is based on a blood relationship to the intestate. The degrees of blood relationship are ascertained by counting upwards to the nearest common ancestor and the downwards from the ancestor to the relative. Where a direct lineal ancestor and any other relative are so ascertained to be within the same degree of blood relationship to the intestate, the other relative shall be preferred to the exclusion of the direct lineal ancestor.

Relatives of the half-blood

Relatives of the half-blood shall be treated as, and shall succeed equally with, relatives of the whole blood in the same degree.

Summary

The following is a summary of how the residuary estate is divided where there is no surviving spouse/civil partner. The residuary estate is divided between the relatives in the highest category in the following list, however large the estate:

- their children, subject to the property being placed in trust, but if none, to
- their parents, equally if both alive, but if none, to
- their brothers and sisters (whether of whole or half-blood) subject to the property being placed in trust, but if none, to
- their nephews or nieces (whether of whole or half-blood) subject to the property being placed in trust, but if none, to
- their grandparents equally if more than one, but if none, to
- their uncles and aunts (whether of whole or half-blood) subject to the property being placed in trust, but if none, to
- their great grandparents, but if none, to
- their other next-of-kin of nearest degree (whether of whole or half-blood)

Each category other than parents and grandparents takes subject to the property being placed in trust. This means that children under the age of 18 take the interest subject to reaching the age of 18 or marrying earlier. Children of a deceased relative may take that relative's share.

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The statutory trusts

Apart from the spouse, parents and grandparents, each category of relative takes subject to the term of a trust. The trusts contain three main provisions:

- **The class of beneficiaries:** The residuary estate is held on trust in equal shares for those relatives in the relevant category who are living at the intestate's death. The term living includes a person who is conceived but not born at the intestate's death.
- **The contingency:** The interest of the beneficiaries is subject to reaching the age of 18 or getting married, whichever is earlier.
- **The substitution:** If a member of the category has died before the intestate leaving a child or children, the child or children take their deceased parent's share, if more than one in equal shares, subject to reaching the age of 18 or getting married whichever is earlier.

This means that if John's two children Jason and Mary are entitled on John's intestacy to €1,000 in equal shares and Jason dies before John leaving two children, Barry and Pam, the amount of €500.00 will go to Mary. John's grandchildren, Barry and Pam will receive €250 each.

Applying trusts for descendants

The primary beneficiaries are the children of the intestate who are living at the death of the testator. Grandchildren are included only by substitution, which is where a child has died before the intestate.

The interests of the children are subject to them reaching the age of 18 or marrying under that age. If a child dies after the intestate, but before they reach 18 or marry, their share is distributed as if they had pre-deceased the intestate.

Any children of the deceased child (i.e. grandchildren of the deceased) who are living at the intestate's death take their deceased parents' share equally between them, subject to them reaching the age of 18 or earlier marriage. Great grandchildren will be included only if their parent had also pre-deceased the intestate.

Whilst money is being held for children before they reach 18, the trustees have powers to advance income and capital to the children.

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Changing your Will

You may change or alter your will at a later date. It is very important for a person who has made a will to read over and review their will for any changes every five years or so. Any changes or alterations must be signed, dated and witnessed in the same way the will was made. Once a Will has been written, you may wish to change it for one of the following reasons:

- to update it
- to revoke it

Updating a Will

Life circumstances change over time, as does the value of your assets. As mentioned already we recommend regular reviews of your Will to ensure it best reflects what you'd like to happen to your estate when you die.

You should consider updating your Will in the following circumstances:

- if your marital status changes
- if there has been a change in your financial/living or health circumstances
- if there has been a change in tax rates in the latest Finance Act
- if you sell anything that is left as a specific gift in your Will
- if you buy something and want to leave it as a specific gift in your Will
- if you adopt or have any more children
- if you move to live outside the Republic of Ireland (you are likely to need a totally new Will in your new country of residence)
- if the person you appointed as the guardian for your children needs to be changed
- if your executors need to be changed
- if you change your mind about the instructions contained in your Will

For more information about updating your Will see: When to update your Will.

Cancelling a Will

You may revoke a Will in three ways:

- Making a subsequent Will or by some writing intending to revoke it.
- By getting married or entering into a civil partnership, unless that Will was made in contemplation of that marriage/civil partnership and you stated that the Will was to continue to be valid after that marriage/civil partnership.
- Physically destroying the Will.

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If it is the person's intention to cancel their existing Will, it is best to make the position absolutely clear in the new Will or codicil. A codicil is a document which alters the terms of an existing Will. For more information on this see our chapter ‘Revoking a will’.

How to alter your Will

Overview

A codicil gives you an opportunity to make relatively small alterations to your Will without the need to draft a completely new Will. It should be remembered that a codicil is an independent document in itself. If you subsequently cancel your Will, you might not cancel your codicil automatically.

If you wish to cancel changes made by way of a codicil, you must make this clear either by making a new Will or else making a new codicil which to that effect.

Codicils

A codicil is similar to a Will but generally it is supplemental to a Will that has been previously made. The process of making a codicil is subject to the same formal requirements as for a Will.

For all practical purposes, codicils are used to make straightforward additions or amendments to an existing Will. These include the change of an executor, a change to a specific gift or the addition of a beneficiary and any other minor alterations that may be required. Where it is necessary to make more fundamental changes to the Will, it is advisable to consider making a new Will.

A codicil can exist independently of any Will. If the testator cancels a Will, but does not cancel a codicil that was made subsequent to the Will, it may result in there being inconsistencies that should be avoided. For this reason, the revocation clause in a subsequent Will should express a clear intention to revoke all former Wills and testamentary dispositions (i.e. documents that are Wills or alter existing Wills (e.g. codicils) or are part of existing Wills).

Types of codicils

There are many different situations which can arise where you might want to make alterations to your Will using a codicil. Some of these are described below:

- to appoint a substitute executor on death of executor
- to make an additional gift to an existing or new beneficiary
- when an executor no longer wishes to act as an executor
- to cancel a gift made in your Will to a beneficiary

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Revoking a Will

A Will is revoked by:

- making a subsequent Will containing a clause revoking the earlier Will
- getting married or entering into a civil partnership, unless the Will was made in contemplation of that marriage or civil partnership and you stated that the Will was to continue to be valid after that marriage or civil partnership
- physically destroying the Will

If it is the person's intention to cancel their existing Will, it is best to make the position absolutely clear in the new Will or codicil (a codicil is a document which alters the terms of an existing Will).

Making a later Will

At any stage during their lifetime a person can decide to change their Will as long as they have testamentary capacity (see 'Capacity and the mind of the testator'). If their mental condition deteriorates and they lose their testamentary capacity, the existing Will would remain in force.

Revocation by a later Will

If a later Will is intended to cancel the whole of an earlier one, it should contain a suitable cancellation clause that clearly indicates that the testator cancels all former Wills. This is called a revocation clause. If the new Will or codicil (a document which alters an existing Will) does not contain an express revocation clause, it may still cancel the earlier Will, but there may not be a complete cancellation.

For example, if the earlier Will leaves a specific gift to John and the subsequent Will, which does not contain a revocation clause, makes no mention of the gift, the gift in the earlier Will is not cancelled and John will receive his gift.

The effect of marriage or civil partnership

If there is no statement in the Will indicating that the testator (someone who makes a Will) intends on marrying a particular person or entering into a civil partnership and that this marriage or civil partnership must not cancel the Will, the subsequent marriage or civil partnership will cancel the Will. Therefore if a person is about to get married or enter into a civil partnership, but wishes to make a Will before the date of marriage or civil partnership, it is advisable to include a clause in the Will stating the position clearly and at the same time identifying the person concerned.

If the testator makes a Will and is later divorced or has their civil partnership dissolved, the former spouse or civil partner is precluded from taking up an appointment as executor or trustee and cannot benefit from the estate. In other words, in the case of divorce or

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dissolution, the spouse or civil partner will not be entitled to act in the management of the estate and will not be entitled to receive benefits under the Will.

Destroying your Will

A testator (someone who makes a Will), or somebody instructed by the testator (e.g. their Solicitor), can destroy the Will by burning, tearing, or destroying the document in some other way. However, it must be the intention of the testator that he or she wishes to cancel the Will in this way and physical destruction without intention to cancel is insufficient.

A Will destroyed accidentally is not cancelled. If its contents can be reconstructed (for example, if the testator or somebody else kept a copy) an order may be obtained allowing a copy of the Will to be accepted by the Probate Office.

If a Will cannot be found at the death of the testator, it is presumed that the Will has been destroyed with the necessary intention to cancel the Will. However, if there is evidence to the contrary, the court may accept the evidence in support of the fact that the testator may have made some remark shortly before their death that expressed his or her wishes to dispose of their estate.

Significant problems arise where the testator physically destroys only part of the Will. If the part destroyed is a sufficiently vital part (for example, their signature(s)), this partial destruction may be held to cancel the entire Will. However, if the destruction is not as substantial or important then the partial destruction may cancel only that part of the Will that was actually destroyed.

The result depends on the testator's intention, and in the absence of evidence as to the testator's actual intention, the court will examine the physical condition of the document. If a person wants to cancel their Will by destruction, they should destroy the entire Will completely and ensure the new Will contains a revocation clause which will remove any doubt as to what the testator intended.

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