WILLS

Law guide – Making and amending a Will

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Making a Will

What is a Will?

A Will is a written declaration setting out the way in which a person's property, assets and other wealth are to be distributed on their death. If a person dies without making a Will, they are said to have died intestate. A person who dies with a Will (a testator) is said to have died testate.

Why you need a Will

Some of the considerations which make it important to make a Will are:

- If a person dies without making a Will, as mentioned above, they are said to have died intestate. The Rules of Intestacy under Part VI of the Succession Act, 1965 dictate how a person's estate is to be distributed which may not be in line with what you would have liked.
- There are issues that can arise for unmarried couples and unmarried same sex couples who have also not registered a civil partnership if there is no Will. Thus, unmarried couples and unmarried same sex couples who have also not registered a civil partnership cannot inherit from each other unless there is a Will and the death of one partner may therefore create serious financial problems for the remaining partner.
- If you have children, particularly children under 18 or children from another or previous relationship, you will need to make a Will so that arrangements for the children can be made if you die.
- You can choose the individuals and/or professional advisors who will administer your affairs after your death in your Will, i.e. your executors.
- It may be possible to reduce the amount of tax payable on the inheritance compared with what would have arisen under the intestacy rules. You may also decide to get professional taxation advice before you draft your Will.

Having a Will is the only way to be sure that your estate is dealt with according to your wishes when you die. Without a Will your assets may end up being distributed by prescribed rules. It is not the case, as many assume, that if a husband or wife dies their entire estate will always automatically pass to their spouse. The estate will be distributed in accordance with rules of intestacy which are discussed in the chapter 'Dying without a will'.

A Will ensures, therefore, that your estate is distributed as you would like it to be, and that your loved ones are properly provided for as you wish. It may also help to ensure that the people you leave your estate to do not have to pay more tax than absolutely necessary. If you are not married or in a civil partnership, it is even more important that you make a Will, particularly if you have a partner and/or children to whom you wish to leave many or all of your assets.

Issues to consider

Before you begin the process of creating your Will, there are a number of matters you should consider carefully.

Who would you like to appoint as executors of your Will?

You will need to decide whom you would like to appoint as executors of your Will. Executors are the individuals and/or organisations that administer your estate when you die. This is one of the most important decisions when you create your Will and your executors can be one or more of the following:

- trusted individuals, such as a relative, friend or partner
- if married, your spouse
- if in a civil partnership, your civil partner
- a solicitor
- a trust company (a specialist service provider that is authorised to act as an executor)

You should be sure only to appoint persons whom you trust and who will see that your estate is dealt with efficiently and quickly. Often a spouse, an adult child or close relative is appointed as executor, but you should consider whether they will have the necessary time and expertise to administer your estate.

Unless you are appointing a solicitor or a trust company, we recommend that you appoint at least two executors. This is simply because the duties and responsibilities of an executor can be onerous and it can be reassuring to your executors for these to be shared. It can also operate as a safeguard against a sole executor dying before you or becoming unable to act for any reason or abusing his or her position.

Although you can appoint as many executors as you want, it is generally not a good idea to appoint more than three or four as, in the course of dealing with an estate after somebody passes away, some forms will have to be signed by all the executors. Having a large number can slow down the administration of the estate.

Do you wish to be buried or cremated?

You might want to think about whether you want to be buried or cremated. While you do not have to state how you wish your body to be disposed of when you die, you may do so if you wish. Whatever you do, it is also important to tell those nearest to you what your decision is and to make sure that the instructions in your Will are kept up-to-date if you change your mind. Furthermore, if you would like to leave your body to medical science, the relevant paperwork could be completed by you and deposited with your Will.

Leaving gifts of money and specific items

You should think about whether you wish to leave gifts of money, called pecuniary legacies, (e.g. €10,000) or gifts of specific items (e.g. your car, your CD collection, your wedding ring).

It should be noted that general legacies may be reduced proportionally where there are insufficient funds to pay the full amount of the pecuniary (i.e. money) legacies, i.e. items may have to be sold to raise the cash amount gifted. Furthermore, you may wish to consider charitable legacies to specific charities of your choice. Any such legacies to registered charities in the Republic of Ireland are free of tax in the hands of the charity.

Do you have children under 18?

You can specify one or more people to act as a guardian in case you and the child's other parent die simultaneously, or the other parent becomes unable to look after the children for any reason. You should ideally agree this with the child's other parent (if applicable) and ensure you have the agreement of the person(s) you are appointing to act as guardians.

Rest of your estate ('residuary estate')

Your residuary estate is defined as what is left of your total estate after payment of any taxes, debts and expenses and after the deduction of any gifts you have made of specific items or money, after you die. For many people this will be the bulk of their estate.

There are a variety of options for giving it away which, for a married person or person in a civil partnership, include giving just the income of the estate to your spouse or civil partner, and holding the rest to be given to others after your spouse/civil partner passes away.

You do need to think carefully about what your spouse or civil partner will need after you pass away, however, and ensure that they are not left in a difficult financial position. In many cases, spouses or civil partners will simply leave the whole of the estate to each other. Please also see below regarding the rights of spouses and civil partners.

Succession rights of spouses and civil partners

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

Claims against your estate

You should be aware that if you have left out, or made inadequate provision for, certain family members and dependants from your Will, there is a possibility that they make a claim against your estate under a Section 117 application. A section 117 application can only be brought if a person dies testate (i.e. died with a valid Will). See the chapter 'Family and dependants left out of the Will' of this guide for a full explanation of a s. 117 application.

Alternate beneficiaries.

In relation to your residuary estate you can nominate alternate residuary beneficiaries (a 'beneficiary' is a person who gets a gift from your Will) in case some or all of those whom you name as the first intended beneficiaries in the Will die before you.

Pets

If you have any pets you can think about who you wish to look after them when you pass away, and whether you wish to leave them any money for the upkeep of your pets.

Please note that you need the full address of anyone you name in your Will, whether making a gift to them or appointing them as executor or guardian. If you are making a gift to a charity, you should get the official name, address and, ideally, the Registered Charity Number.

Inheritance tax on gifts

Inheritance tax, also referred to as Capital Acquisitions Tax (CAT), is a tax on inherited gifts. Any tax that may be due is paid by the individual or the organisation receiving the gift, i.e. the beneficiary.

Tax free thresholds

A gift or inheritance from a spouse or civil partner is not liable to inheritance tax. This only applies to a legal spouse or civil partner and to divorced persons or where a civil partnership is terminated in certain circumstances. A cohabitant, or partner in the general meaning (i.e. not a civil partner), is treated as a stranger for tax purposes.

If you leave a gift to someone other than a spouse or civil partner then the first portion, known as the tax free threshold, is taken free of tax. The amount of the tax free threshold depends on your relationship to the beneficiary and will also depend on whether any other benefits have been received by them previously.

Where you leave a gift to a child or a child of your civil partner, or a minor child of a deceased child or, in certain circumstances, to a foster child or to a parent (in an unrestricted form) then the tax free threshold is the largest; known as the Group A threshold. If the property is left to a parent (where it is a restricted interest), brother or sister, niece or nephew, or grandchild, then Group B threshold applies, and if property is left to anyone else, e.g. a friend, in law, cousin or partner then Group C threshold applies. See this link for the current threshold amounts - Capital acquisitions tax.

If a person has received other gifts or inheritances since 5 December 1991 then they are added together according to certain rules relating to the date on which the gifts were received and from whom they were received. The effect of this may be to reduce or remove the tax free threshold available for that individual.

Exemptions and reliefs

There are various exemptions available which can reduce or eliminated the amount of tax to be paid. These can also change over time. The following are some of the exemptions currently available:

- **Agricultural property:** To qualify for agricultural relief, 80% of the beneficiary's property (after a gift/inheritance) must consist of agricultural assets. The value of the agricultural property he/she receives may then be reduced when making the CAT return provided other conditions are met.
- **Business property:** If business property, which would generally include assets such as a business or shares in a family company, is inherited, then the beneficiary may be entitled to claim business relief so that the value of the business property inherited is reduced when calculating the inheritance tax (if any) subject to other conditions.
- **Favourite nephews or nieces:** If the beneficiary is a nephew or niece who worked full-time in the business/on the farm with you for five years, and you leave the

business/farm to him/her, then he/she may be entitled to the same tax-free threshold as a son or daughter in relation to that property.

- **Dwelling:** If you leave a house or apartment to a beneficiary who has continuously occupied it as his/her main residence for a period of three years immediately before the date of your death and he/she continues to occupy it for a period of six years after the date of your death, then such a beneficiary may be exempt from tax on his/her inheritance of the house provided all the conditions for exemption are complied with.
- **Minor child of deceased child:** If you leave property to a grandchild who is the child of a child of yours who has predeceased you, and that grandchild is under the age of 18, then that grandchild will be entitled to the same tax free threshold as a child.
- **Surviving spouse or civil partner:** If property is left to the spouse or civil partner of a deceased member of your family, that spouse or civil partner will be entitled to the tax free threshold amount that the deceased family member would have been entitled to in relation to that inheritance.

Inheritance tax planning

You may decide that it is advisable to seek professional taxation advice on how best to allocate your estate among your beneficiaries before you finalise this Will.

In seeking such advice you may also wish to consider getting a Section 72 policy which is an inheritance tax planning tool. It allows for an inheritance tax liability to be provided for in a highly tax efficient manner hence easing the burden of transferring wealth from one generation to the next.

Technically a Section 72 policy is a whole of life policy set up to meet the requirements of Section 72 of the Capital Acquisitions Tax Consolidation Act 2003. Usually the policy is set up under a Section 72 trust making the proceeds of the policy exempt from inheritance tax.

Capacity and mind of the testator

Who can make a Will?
Section 77 of the Succession Act 1965 provides that a Will can be made by a person who:

- has attained the age of 18 years or is or has been married
- is of sound mind

Section 31 (1) of the Family Law Act 1995 provides that marriage solemnised after the introduction of this section between persons either of whom is under the age of 18 years will not be valid in law.

However, a person who entitled to appoint a guardian of an infant may make the appointment by Will, notwithstanding that he or she has not attained eighteen years of age or been married.

Testamentary capacity

The testator must have the requisite mental capacity – called 'testamentary capacity' - when they sign their Will.

The test for determining whether a person has testamentary capacity to make a Will was laid down in the UK case of *Banks v Goodfellow* (1870) LR5 QB 49 as follows:

- The testator must understand that he or she is making a Will, which will dispose of their assets on death.
- The testator must be capable of knowing the nature and extent of his or her estate.
- The testator must be able to give consideration to possible beneficiaries.

If the testator lacked the requisite mental capacity at the time they signed their Will, then the Will is generally regarded as invalid.

There is a presumption however that, unless the contrary is proved, the testator is sane, so the burden of proving that the testator lacked testamentary capacity falls on the person who seeks to prove, after the testator's death, that the Will is invalid.

Practical precautions

If there is any doubt as to whether the testator had the necessary testamentary capacity to make the Will, it may be advisable to arrange for a medical practitioner to examine the testator at the time the Will is to be signed to verify their mental capacity and to have that medical opinion recorded.

Undue influence and fraud

A Will must not be made as a result of either the undue influence or the fraud of another person.

Undue influence means coercion; i.e. the testator is coerced into making a Will (or part of a Will) which he or she does not want to make. Presumed undue influence can often arise where there is a relationship of trust and confidence between the parties. In such instances, the mere existence of the relationship alone can be deemed sufficient to establish that the plaintiff could not have acted independently and freely of their own mind to consent to such transaction. If a person has obtained independent legal advice this can often rebut any presumption of undue influence.

Fraud consists of deceiving the testator. For example, it would be fraud to tell a testator that a potential beneficiary had done or said something of which the testator would disapprove, when he or she had not.

A testator must know and fully understand the contents of his or her Will at the time that he or she signs it.

A testator who has the necessary capacity and has signed their Will is presumed to have the requisite knowledge and approval. However, there are circumstances where the presumption does not apply. This occurs in the case of a blind or illiterate person or a person who does not sign personally. The presumption of the testator's knowledge and approval does not apply if the testator is deaf and dumb, blind or illiterate or another person signs the Will on his/her behalf (for example, because he/she has an injured hand).

Where there is doubt as to whether a testator has the requisite knowledge, the Probate Office registrar will require evidence of the testator's actual knowledge and approval. In cases where the testator is blind, illiterate or does not sign personally, it is best that the Will is read out and approved by the testator in front of the witnesses. At the end of the Will (where provision is made for signature by the witnesses), a clause should be inserted confirming that the Will was read over to the testator and the testator understood and approved its contents. This clause is known as the attestation clause. Without such an attestation clause, the Probate Office will require affidavit evidence of the testator's knowledge and an affidavit sworn by the attesting witnesses who were present at the signing of the Will.

Where there are suspicious circumstances surrounding the drafting or signing of the Will, it will be up to the person seeking to rely on the Will to rebut the presumption.

Appointing executors and guardians

Executors

These are the people and/or organisations (e.g. a solicitor's firm) who are left to manage and administer the testator's (someone who makes a Will) affairs after death and should therefore be expressly appointed in the Will. If the testator fails to appoint executors, administrators are appointed by the court to manage the estate. What this means is that those relatives who benefit from the estate according to the rules of intestacy may apply and be appointed as administrators. By making a Will, you are given the opportunity therefore to choose the people whom you would like to administer your estate when you die.

The testator can appoint any number of executors. However, at least two executors should be appointed. In a small and straightforward Will the major beneficiary is often appointed as the sole executor. Difficulties can arise when a single executor dies or becomes ill and is not able to continue administering the estate, so it is a sensible precaution where a single executor has been appointed to provide for a substitute to take their place if the original executor dies or becomes ill.

Executors should be chosen carefully. If the estate is uncomplicated, trustworthy relatives or family friends would be suitable. However, should the estate be complex, it may be sensible to appoint a professional executor together with the relative or friend. Whatever decision is made, the testator should check whether a particular person is prepared to act.

Trustees

If a trust is created under the terms of the Will, then the testator must appoint both executors to manage, administer and distribute the assets, and trustees to run the trust which will come into effect. Where executors and trustees are required, it is practical and convenient to appoint the same people to perform both functions.

The trustees will need to obtain a receipt for all the trust property, which means that they will have to show that they have discharged their obligations regarding distribution of the assets by handing over the correct trust assets, in their shares, to the correct recipients.

Paying trustees

Where a professional person is appointed, it is usual to include a clause that will allow that person to charge reasonable remuneration for acting in a professional capacity. This is called a charging clause.

Appointment of guardians

If the testator has any children younger than 18, they should consider who would be responsible for those children on their death. Equally, the testator may be concerned about any future children who might be under this age at the time of their death. Where a dispute arises over the care of children, the court has the final say. This means that, after considering

all the facts and taking into account all the circumstances, the court will make an appropriate order appointing a guardian to look after the minor child or children. The intention in your Will to appoint guardians may be considered by the court.

It is always important to ask the person or persons that one intends to appoint as guardian. After all, they should be aware of the position in advance and can indicate whether they are willing to act or not. Provision should also be made for the costs of the children's upbringing, i.e. by making a gift to the child in your Will to meet their needs and expenses.

You could also appoint the guardians as your executors which then allows them to use these funds for the benefit of the child until they reach the age of 18. In addition, you could make a gift to a child and specify that they cannot receive this gift until they reach a certain age.

Any parent who has parental responsibility for their child (generally both parents if married or divorced and the mother if never married) may appoint one or more individuals to be the child's guardian. Such an appointment must be made in writing, dated and signed by the parent. The appointment need not be by Will, but a clause in the Will is sufficient. A person can also cancel the appointment in writing, provided the cancellation is signed and dated even if the original appointment was in a Will.

The appointment of the guardian takes effect on the death of the parent provided generally that there is no surviving parent with parental responsibility for the child at that time. If there is a surviving parent with parental responsibility, then the appointment of the guardian takes effect only on the death of the surviving parent.

Where the parents are married and there has been no legal dispute over the children, both parents retain parental responsibility until their respective deaths. By way of example, a father includes a clause in his Will appointing a guardian for his children. The appointment will only take effect at his death if the mother is by then already dead. If the mother survives, the father's appointment of a guardian only takes effect on her eventual death. If she has appointed a different person as guardian for the child then both appointees will share parental responsibility. It is clearly better to avoid such a situation and parents should consider appointing the same person as the guardian where possible.

Contents of a Will

Introduction

In addition to those provisions in a Will that deal with the appointment of executors and guardians (see 'Appointment of executors and guardians'), or that specify who is to inherit what property (see 'Gifts and beneficiaries'), a Will typically includes the provisions detailed below.

The opening clause

In all Wills it is traditional to have an opening clause that identifies the testator (the person making the Will), their full name and address, as well as any other names by which they have been known. This makes it easier to identify the person who made the Will should any problems arise. The opening clause usually includes the current address of the testator being the last address where the testator lived.

The opening clause further states that the Will is 'the testator's last Will and testament' and that helps to demonstrate that the testator intended the document to be a Will.

The revocation clause

The revocation clause revokes any previous Wills made by the Testator. It is important to express the fact that the current Will replaces all previous Wills and testamentary dispositions (i.e. documents that are Wills or alter existing Wills (e.g. codicils) or are part of existing Wills) that were prepared and signed by the testator as it makes the testator's intention absolutely clear.

NB: If you have a foreign Will to deal with any foreign assets, care should be taken not to revoke any such Will if this is not your intention.

Funeral instructions

The testator may also wish to give specific instructions with regard to burial. If it is the testator's wish, for example, to be cremated then this may be expressed.

Types of gifts

In Wills, you are generally able to make three different types of gift - specific, pecuniary (i.e. related to money) and residuary. These three types of gift are described below:

Specific

A specific bequest is a gift of a particular item, or group of items of property. For example, you may leave a piece of jewellery or all of your jewellery to a friend or relative.

The item or items may or may not be owned by the person making a Will when the Will is made.

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.

See the chapter 'Losing a gift' for more information.

Pecuniary

A pecuniary gift is simply a gift of money.

Residuary

A residuary gift is a gift of what is left of your estate, known as the residuary estate or residue, after payment of debts, expenses and deduction of gifts you have made, if any, of a specific or pecuniary nature as described above, after you die.

Normally, a Will states that all the debts, expenses and any other gifts are to be paid out of the residue before it is distributed.

Residuary estate

For many people this will be the bulk of their estate and there are a variety of options for giving it away, which for a married person or person in a civil partnership include giving just the income of the estate to your spouse or civil partner, and holding the rest to be given to others after your spouse or civil partner passes away.

You do need to think carefully about what your spouse or civil partner will need after you pass away, however, and ensure that they are not left in a difficult financial position. See also below regarding the succession rights of spouses and civil partners.

In many cases, spouses or civil partners will simply leave the whole of the estate to each other. You could also give a proportion of your residuary estate, expressed as a percentage, to specific individuals or organisations such as a charity and then leave the rest to your spouse, civil partner or partner as the case may be.

Succession rights of spouses and civil partners

The provisions of the Succession Act, 1965 offers protection to the surviving spouse or civil partner by giving them, what is called, a 'legal right share' in the estate of the deceased.

Where a testator leaves a spouse or civil partner and no children, the spouse or civil partner has a right to one half of the estate. Where a testator leaves a spouse or civil partner and children, the spouse or civil partner has a right to one third of the estate (section 111 of the Succession Act, 1965).

Claims against estates

You should be aware that if you have left out certain family members and dependants from your Will, there is a possibility that they could make a claim against your estate under a section 117 application. A section 117 application can only be brought if a person dies testate, i.e. died with a valid Will.

See the chapter 'Family and dependants left out of the Will' of this guide for a fuller explanation of a section 117 application.

Gifts to children

If you have given income or capital to a person under the age of 18, then you can give your trustees the option of giving the income or capital to the minor before they reach this age. Generally, such a person would not be able to receive the gift. Specific authorisation in the Will is required. 'Income or capital' does not, however include shares or other assets such as real property where a transfer of title is required.

This authorisation does not give the minor the right to demand the income or capital. Your trustees can still choose whether or not to give the gift to the minor. It may be convenient, however, to give your trustees this flexibility. Otherwise, your trustees would continue to have responsibility until the minor reaches the age of 18, which would increase the costs of administering your estate perhaps unnecessarily or disproportionately; or else the trustees

could give the gift to the minor's parent or guardian (or a person with parental responsibility for the minor) on behalf of the minor, which carries a risk that the income or capital will not be properly applied for the benefit of the minor.

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A residuary gift is a gift of what is left of your total estate - known as the residuary estate or residue - after payment of any taxes, debts and expenses outstanding and the deduction of any gifts you have made of specific items or money as described above, after you die.

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In many cases, spouses or civil partners will simply leave the whole of the residuary estate to each other. You could also give a proportion of your residuary estate, expressed as a percentage, to specific individuals or organisations such as a charity and then leave the rest to your spouse, civil partner or partner as the case may be.

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This authorisation does not give the minor the right to demand the income or capital. Your executors can still choose whether or not to give the gift to the minor. It may be convenient, however, to give your executors this flexibility. Otherwise, your executors would continue to have responsibility until the minor reaches the age of 18, which would increase the costs of administering your estate perhaps unnecessarily or disproportionately; or else the executors

could give the gift to the minor's parent or guardian (or a person with parental responsibility for the minor) on behalf of the minor, which carries a risk that the income or capital will not be properly applied for the benefit of the minor.

Making a gift to an Irish charity

While you will naturally want to make adequate provision in your Will for your family and friends, you may want to consider making a gift to an Irish charity as well.

Making a gift to a charity is relatively simple. You need to get the name, address and, preferably, the Registered Charity Number of any charities you wish to give to and decide what gift(s) you wish to make. You can make a gift of money, specific items, or include them as a residuary or alternative residuary beneficiary.

Specific wishes regarding use of the gift

In making a gift you may wish to specify that it should be used for a particular purpose, or purposes, by the charity. In doing so, however, your gift becomes conditional and restricted. If the charity is unable to meet the conditions you have specified there could be difficulties in making the gift.

This may not be a problem, however, if your wishes are closely related to what the charity already does.

A more flexible way of stating you wishes would be to use a Letter of wishes. A letter of wishes is not legally binding and therefore it allows you to express your hopes for how the gift will be used but does not bind the charity if there are difficulties in carrying out your precise instructions.

Taxation of gifts received by a charity

A gift is exempt from Inheritance Tax once the Revenue Commissioners are satisfied that it has been or will be applied to purposes which, in accordance with Irish law, are public or charitable.

Charities meeting required criteria can apply for 'charitable tax exemption' status to the Revenue Commissioners. In granting this exemption the Charities Section of the Revenue Commissioners assigns the charitable body a CHY reference number. The full list of bodies granted this exemption is published on the Revenue Commissioners' website at Charities with tax exempt status.

If you decide to make any gifts to charities in your Will, you should also inform the charity, or charities, that you have done so.

Type of charitable gifts

The LawOnline Wills process gives you the option of leaving a gift to a charity. There are three different types of gifts or legacies that are most commonly given through Wills to bodies such as these, as follows:

1. Residuary gift: Your residuary estate, or residue, is what remains of your total estate after deducting any debts, taxes or expenses that are due and the value of any specific legacies that you have made in your will, e.g. legacies to your closest family members. You could then leave all, or a percentage, of the residue to a charity in the knowledge that you have already taken care of the people closest to you.
2. Pecuniary gift: This is a gift of a specific or fixed amount of money.
3. Specific gift: This is the bequest of a particular item or asset such as property, jewellery, shares etc..

Using a codicil to make a gift to charity

Where you would like to make some relatively simple and straightforward amendments or alterations to your Will, but you do not wish to create a new Will, you should use a codicil to do so.

Thus, if you have already made a Will and now wish to make a gift to a charity you can do so by using a codicil without having to draft an entirely new Will.

LawOnline provides a codicil document process specifically for the purpose of making a gift to a charity – see Codicil making a gift to an Irish charity.

The Charities Regulatory Authority

The Charities Regulatory Authority lists all charities operating in the Republic of Ireland. The register can be accessed at Charities Regulatory Authority and contains the following information about each charity:

- name of the charitable organisation
- principal place of business
- other names, abbreviations, etc.
- the Registered Charity Number
- governing form
- whether it is an educational body
- CHY & registered company numbers (if both applicable)
- country where charity established
- purpose and objects of the charitable organisation
- activities and beneficiaries of charity
- reporting period
- average number of employees in reporting period
- number of individuals volunteering for the charity in reporting period
- gross income in reporting period as supplied by the charity

- total expenditure in reporting period as supplied by the charity
- name of charity trustees/officers/directors
- other locations and premises in Ireland
- whether operating in Northern Ireland and registration number if registered there
- other countries charity is operational in

It is advisable to quote the Registered Charity Number in your Will to ensure that your gift goes to the correct charity. It is also recommended that you check the correct address of the charity's principle location of its operations.

Gifts to Irish amateur sports clubs

Similar to charities, amateur Irish sports clubs can qualify for an exemption from Inheritance Tax as long as the gift is used for a 'public purpose'. The latter term is not defined by the Revenue Commissioners. The club should be a recognised sports club ideally affiliated to a National Governing Body within the Federation of Irish Sports.

Thus you may also wish to consider making a gift in your Will to your local sports club and the same considerations apply as outlined above in respect of charities.

If you have already made a Will and now wish to make a gift to an amateur sports club you can do so by using a codicil without having to draft an entirely new Will. LawOnline provides a codicil document process specifically for the purpose of making a gift to an amateur Irish sports club – see Codicil making a gift to an Irish amateur sports club.

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

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.

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.

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

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.

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.

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.

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.

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.

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.*

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.

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).

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.

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.

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.

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

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.

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

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

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.