

# The Technical Information

## Last Will and Testament

### ***Definition***

A Will is a legal declaration of an individual's intentions of how he or she wishes to dispose of their property upon death.

### ***Comments***

The purpose of a Will is to convey, in clear terms, what is to happen to the testator's estate on their death. In doing so the onus should be on precision, accuracy and effectiveness of communication.

A Will must be in writing.

A Will for the purpose of this course must make a gift of property situate in England or Wales .

## Why make a Will?

### ***REASON 1 To avoid Intestacy***

Making a Will avoids intestacy (intestacy means dying without a Will)

A full intestacy occurs where there is no disposition of a person's estate because they have not left a valid Will. A partial intestacy occurs when there is an incomplete disposition of a person's estate.

(The current statutory rules regarding the distribution of the residuary estate of an intestate are contained in the Administration of Estates Act

1925 ss 46 to 47A. These rules have recently been changed by the Inheritance and Trustees' Powers Act 2014 which came into force on 1 October 2014.)

***REASON 2 To allow you to choose what you would like to happen on your death.***

**Making a Will allows the testator (the person making the Will) to**

1. Choose how their estate is to be divided.
2. Appoint their own choice of Guardians, Executors and Trustees.
3. Speeds up Probate.
4. Having a Will is the only way to ensure a gift to Charity.
5. A Will can reduce Inheritance Tax (IHT) costs, as well as protect some assets against Residential Care Costs.
6. It can also protect some of the assets, ensuring they go to the children in the case of re-marriage.
7. Allows un-married partners to pass assets to each other.
8. Making a Will gives peace of mind.

## **REASON 3**

Making a Will allows you to appoint Executors, Trustees and Guardians.

### **Who can make a Will?**

Anyone over 18 years old who has Testamentary capacity (**Banks vs Goodfellows 1870**)

#### ***Banks vs Goodfellows 1870***

According to the legal test from Banks vs Goodfellows 1870 Testamentary capacity means the testator must understand:

1. the nature of the act and its affects.
2. the extent of their property.
3. their duty to others.

### **What are the different types of Will**

#### ***Single Will***

A Single Will is a Will made by an individual.

#### ***Mirror or Reciprocal Will***

Reciprocal or mirror Wills are where two people (generally a couple) make Wills in essentially identical terms. Each Will made is independent and separate to the other Will and (in contrast to a mutual Will) is freely revocable.

#### ***Mutual Will***

Mutual Wills are separate Wills executed under an agreement that they will not be revoked or altered once one of the parties to the agreement

has died. Once one of the parties has died the other party is bound by the agreement not to revoke their Will. While they can still technically revoke their Will (either expressly or by a subsequent marriage or civil partnership) they will be in breach of the mutual Will agreement. This means that when they die the executors of their new Will will be granted probate but will hold the estate on trust to give effect to the terms of the original (mutual) Will. **Mutual Wills should generally be discouraged**

### ***Joint Wills***

A joint Will is a single document which embodies the Wills of two (or more) persons. Essentially A and B make a single Will which disposes of all A's assets and all of B's assets. On the death of each testator probate is obtained of the joint Will in respect of that particular deceased.

A joint Will must be expressed to be a joint Will and contain the joint dispositions of the testators. It is revocable at any time – by either of the testators during their joint lives or by the survivor after the death of one of them. Joint Wills are very unusual in this jurisdiction. **Joint Wills are not recommended** and the draftsman should actively discourage testators from making a joint Will.

They are inappropriate, and whatever is the objective, it can be better achieved by individual Wills.

### ***Statutory Will***

A Statutory Will is a Will made by the courts on behalf of someone who is not mentally capable.

### ***Privilege Will***

A Privilege Will is a Will made by a member of the Armed Forces who is on active duty. They can be under 18 years old.

### ***What to consider when appointing Executors/Trustees in a Will.***

1. Will they out-live the testator?
2. Must not be bankrupt.
3. Are they willing and able.
4. Are they over 18 years old.
5. Are they honest and competent?

### ***What to consider when appointing Guardians in a Will.***

1. Are they responsible?
2. Are they acceptable to the child?
3. Do they understand the financial implications?
4. How old are they.
5. What are their religious and educational backgrounds?
6. Are they honest and competent?

**N.B. If a Guardian is also a Trustee, it is also wise to have another Trustee**

### **What are the effects of marriage and divorce on a Will?**

1. Marriage – Wills are revoked upon marriage, unless the Will is written in anticipation of marriage to that particular person (there is no time limit, but the person must be named).
2. Divorce – The divorce absolute means the person is treated as dead and cannot be a Beneficiary or Executor.

## **Other considerations when making a Will.**

### ***Inheritance (Provision for Family and Dependents) Act 1975.***

Under the Inheritance (Provision for Family and Dependents) Act 1975, a variety of people may make an application to the court for an award on the basis that the testator's Will or the law relating to intestacy fails to make reasonable financial provision for the applicant.

The potential applicants under this Act are as follows:

- (i) A spouse or civil partner of the deceased;
- (ii) A former spouse or civil partner of the deceased;
- (iii) A cohabitee who has been living as the husband or wife or civil partner of the deceased for the preceding 2 years;
- (iv) A child of the deceased;
- (v) A person who in the case of any marriage or civil partnership to which the deceased was a party was treated by the deceased as a child of the family in relation to the marriage or civil partnership;

Any person who was being maintained by the deceased immediately before his death.

## ***How are Gifts (Legacies) passing through a Will treated***

3 ways a gift can be treated

1) **Lapse** – If the beneficiary dies before the testator then the gift lapses and would normally be divided between the surviving beneficiaries

2) **Issue per stirpes** - If the beneficiary dies before the testator then the gift is passed equally to the descendants of the beneficiary by branch (per stirpes) ie equally to children then if that fails equally to grandchildren etc.

3) **Gift over** - If the beneficiary dies before the testator then the gift is given to another (the gift over) beneficiary.

## **Ademption**

Ademption occurs when a specific gift in the Will such as a house or a car ceases to be part of the testator's estate between the making of the Will and the testator's death. The result is the gift is addeemed and the proposed beneficiary receives nothing.

## **Abatement**

If there isn't enough money left in your estate to cover all of your bequests (gifts) then it is up to your executor to apply the rules of **abatement** which means the beneficiaries gifts are proportionally reduced.

E.g. If the Will gave £500k in gifts but the assets were in the estate were £250k then each beneficiary would receive half the amount contained in the Will.

### ***Assets that can be passed in a Will.***

1. Houses
2. Cash
3. Specific items and Gifts.

**N.B. These must be solely owned by the Testator.**

### ***Assets not able to be passed in a Will.***

1. Assets in Trust (eg Life insurance held in Trust)
2. Jointly owned assets.
3. Death in service benefits.
4. Nominated assets (Pension)

## **Attestation process – The signing of the Will.**

## ***The Legal Position***

The ordinary formalities for a properly executed Will are laid down in **Section 9 of the Wills Act 1837**. Section 9 holds that no Will shall be valid unless:

- (a) it is in writing, and signed by the testator, or by some other person in his presence and by his direction; and
- (b) it appears that the testator intended by his signature to give effect to the will; and
- (c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and
- (d) each witness either—
  - (i) attests and signs the will; or
  - (ii) acknowledges his signature;

## ***The standard (and recommended) procedure***

The Testator must understand the Will he is signing .

The testator must have two witnesses (independent from the Will) and must sign in front of the witnesses who must then sign in front of the testator and each other.

The Testator must acknowledge to the witnesses that he understands the contents of what he is signing.

Witnesses do not need to be over 18 years of age, however it is strongly advisable.

## **Amendments to a Will – Known as a Codicil**

These amendments are legally acceptable providing they satisfy certain criteria, however in the age of computers Will rewrites have made codicils almost obsolete. The cost is the same, but we view them as far safer.

## **Challenges to a Will (Probate Claim)**

Probate Claims usually involve allegations of one or more of the following:

- (1) That the testator did not properly execute his Will.
- (2) That the testator lacked testamentary capacity to make a Will.
- (3) That the testator did not know or approve the contents of his Will.
- (4) That the testator was acting under undue influence when the Will was made.
- (5) That the Will was made by fraud.

## **Parental Responsibility**

1. Mother has PR as does married father of the child.
2. Jointly registering the birth of the child with the mother (from 1 December 2003)
3. Natural father may marry mother.
4. He may sign a Parental Responsibility Agreement with the mother.
5. Apply to court for a Parental Responsibility Order.

### ***How to treat Foreign property***

Where a testator owns property overseas (including Scotland) or has a foreign residence, nationality or domicile then complexities can arise regarding the effectiveness of an English Will both as to assets in England and Wales and assets elsewhere. The general advice is to have a Will in each country where assets are owned and to ensure that no Will revokes another.

## ***Types of House ownership***

**Sole tenancy** - Sole tenancy is self-explanatory and means the house is owned solely by the testator.

**Beneficial Joint tenancy** - Beneficial Joint Tenancy means the house is owned jointly with someone else normally your spouse or partner. When one of them dies the house is automatically passed to the survivor (by survivorship) and therefore cannot be distributed through the deceased estate.

**Tenants in Common** - Being Tenants in Common means that the testator owns the house jointly with one or more people. Under this type of ownership the testator's share is passed through their estate.

## **Trusts**

### ***What is a Trust***

A trust is a legal arrangement where one group of people (the trustees) are made legally responsible for the assets within the trust which are then held for the benefit of another group of individual (the beneficiaries)

### ***How a Trust is established***

Intervivos or Will Trust

**Intervivos Trust** – this type of trust is set up during a person's lifetime by a trust deed . The trust can be either revocable or irrevocable.

**Important note:** This course does not cover intervivos trusts and this is for information purposes only.

**Will Trust** - this type of trust is part of a Will and is only established on the testators death.

### ***Types of trust***

The main types of trust are:

- bare trusts
- interest in possession trusts
- discretionary trusts
- accumulation trusts
- mixed trusts
- settlor-interested trusts
- non-resident trusts

Each type of trust is taxed differently. Trusts involve a 'trustee', 'settlor' and 'beneficiary'.

### ***Bare trusts***

Assets in a bare trust are held in the name of a trustee. However, the beneficiary has the right to all of the capital and income of the trust at any time if they're 18 or over (in England and Wales), or 16 or over (in Scotland). This means the assets set aside by the settlor will always go directly to the intended beneficiary.

Bare trusts are often used to pass assets to young people - the trustees look after them until the beneficiary is old enough.

**Example:** You leave your sister some money in your will. The money is held in trust. Your sister is entitled to the money and any income (for example interest) it earns. She can also take possession of any of the money at any time once the stipulated age of inheritance is reached.

(Source HRMC website)

### ***Interest in possession trusts***

This type of trust gives the income from the assets within the trust fund to the beneficiary during their lifetime (known as the life tenant or income beneficiary ) or for a specific period of time. When the life tenant (normally the spouse) dies or the specific period of time has elapsed then the fund passes to the beneficiaries of the Trust.

If the fund consists of a share of a house then the life tenant would be granted right of occupation during their lifetime or for a specific period of time.

**Example:** You create a trust in your Will granting a right of occupation in the beneficial share of your house to your spouse (known as the life tenant) as well as a right to income and on the death of the spouse the house is passed to the beneficiaries.

### ***Discretionary trusts***

These are where the trustees decides who gets what and when.

Depending on the trust deed, the trustees decide:

what gets paid out (income or capital);

which beneficiary to make payments to;

how often payments are made;

any conditions to impose on the beneficiaries;

Discretionary trusts are sometimes set up to put assets aside for:

a future need, like a grandchild who may need more financial help than other beneficiaries at some point in their life;

beneficiaries who aren't capable or responsible enough to deal with money themselves;

To allow the trustees the opportunity to pass assets on at a time that best suits a beneficiary;

### ***Nil Rate Band Trusts (NRB)***

This is a discretionary trust where the trust fund consists to up to the value of the nil rate band .

Within Estate planning these are normally used for partners who are unlikely to marry and who have children between them and want everything passed to their children on second death.

The surviving partner is allowed to borrow the trust fund on a 'loan note' basis which is repayable on death or on demand and when worked correctly this allows both parents NRBs to be utilised when passing the assets to the children.

### ***Accumulation and maintenance trusts***

An accumulation and maintenance trust is a type of discretionary trust with a twist. This trust is where the trustees can accumulate income within the trust and add it to the trusts capital and is usually used for the maintenance and education costs of someone under the age of 25 years and is designed primarily to ensure future financial provision for children and grandchildren.

### ***Mixed trusts***

These are a combination of more than one type of trust. The different parts of the trust are treated according to the tax rules that apply to each part.

## **Inheritance Tax (IHT)**

Tax paid by the individuals estate at a rate of 40%.

There are the following allowances available before tax is paid

The Nil Rate Band allowance (**NRB**) which is currently £325k and is available to everyone

The Residential Nil Rate Band (**RNRB**) which applies where a testator has owned or at point of death owns a house of residence that is then gifted directly to Linear descendants:

2017	£100k
2018	£125k
2019	£150k
2020	£175k

## **Gifts where no IHT is payable**

Spouse

Charities

Political Parties

## **What else can I give away that are Inheritance tax-free?**

A gift of up to £3000 in any one year ( in addition to the above)

Gifts that are worth less than £250 (there is no limit to the amount of times you can do this providing they are given to different people.  
ie You can give as many gifts of up to £250 to as many people as you want although cannot include anyone who has already received a gift of your whole £3,000 annual exemption.

Wedding gifts In this case, if the gift is to be effective for inheritance tax purposes, it has to be made before, not after, the wedding and the wedding has to happen, and it has to be: 1Given to a child and is worth

£5,000 or less,

Given to a grandchild or great-grandchild and is worth £2,500 or less, or

Given to another relative or friend and is worth £1,000 or less.

Gifts to help with living costs

Gifts to help pay the living costs of an ex-spouse, an elderly dependent or a child under 18 or in full-time education are exempt.

### **Potentially exempt transfer (P.E.T.).**

A Testator may give any amount away Tax Free during their lifetime, providing they live 7 years after the gift was made. Should they die within the 7 years then the Tax Allowance is tapered as below.

This is known as taper relief.

0 – 3 years 100% of Tax is payable.

3 – 4 years 80%

4 – 5 years 60%

5 – 6 years 40%

6 – 7 years 20%

After 7 years no Tax is payable.

The Testator must have no interest (reservation of benefit) in the gift for the P.E.T to qualify.

## **Business Assets and how they are treated for IHT purposes**

Sole Trader

Partnership

Ltd Company

Business Assets form part of the deceased estate for IHT purposes, however they normally attract 100% Business Property Relief (BPR) if the following conditions are met and therefore no IHT would be payable on these Assets.

1. The business is not an Investment Business
2. The deceased was running the business at point of death
3. The deceased had owned the business for 2 years or more
4. The deceased had not entered into a contract to sell the business at point of death.

## **Intestacy (Dying without a Will)**

The chart on the next page shows what happens when you die without a Will.

(The current statutory rules regarding the distribution of the residuary estate of an intestate are contained in the Administration of Estates Act 1925 ss 46 to 47A<sup>1</sup>. These rules have recently been changed by the Inheritance and Trustees' Powers Act 2014 which came into force on 1 October 2014.)

## **The Lasting Power of Attorney**

The Lasting Power of Attorney effectively allows you to appoint people to act on your behalf.

The Attorneys can act Solely , Jointly or Jointly and Severally or as a Replacement and the cost of registration is £82.

The LPA consists of a number of parties:

The Donor

The Certificate Provider

The Attorneys (or Replacement Attorneys)

One witness

Each section of an LPA must be signed and witnessed and **this must be done in the following order:**

The Donor

The Certificate Provider.

The Attorneys

And finally the Donor again who must sign the last page.

The LPA is then sent off for registration.