

WILLS

A will is a written document which sets out how you want your assets to be divided when you die.

Without a will, the law provides that your assets are distributed to certain next-of-kin in accordance with a fixed formula. The formula may not reflect your wishes and may result in hardship, cost and delay for your family.

Valid Wills

For a will to be valid the following requirements must be met. It must be:

- in writing;
- signed at the end by the person making the will;
- witnessed by 2 adults present when the will is signed or acknowledged;
- the witnesses must not be beneficiaries nor the spouses of any beneficiaries.

Failure to comply with these requirements may lead to the will being unenforceable and your assets being distributed as if you had not made a will. However, since 1989 the Court has discretion in circumstances where the formal requirements have not been met to declare the will to be valid.

Executor

This is the person you name in the will who is responsible for carrying out your wishes when you die. The executor: obtains a grant of Probate (the formal proving of the will, if necessary); pays any debts and expenses; collects the assets; and distributes to the beneficiaries named in the will.

One or more of the beneficiaries may be named an executor. If you name only one executor you should also nominate a substitute in case the original executor dies before you or before your estate is finalised. Any person you appoint should be someone you trust and who would have the time and ability to carry out their duties.

Where young children are beneficiaries their share is held by a trustee and invested on their behalf. Normally, the executor also acts as the trustee. The trustee is responsible for deciding how the estate monies are invested, as well as how those monies should be applied for the children's maintenance and education.

Beneficiaries

A beneficiary is a person or an organisation who receives part or all of your assets under the terms of your will. This gift may be a specific asset (such as real estate or jewellery) or a sum of money. The will should also make provision for how the gift is to be left in the event that the beneficiary dies before you.

If you leave a gift to a charity it is essential that the name of the charity is correct.

Testamentary Trusts

In simple terms, a testamentary trust is a discretionary trust established by a will which will only commence on the death of the person making the will. The trust is controlled by a trustee (who is usually the primary beneficiary of the trust) who decides how the income and capital of the trust fund is to be divided amongst various classes of potential beneficiaries (for example, the primary beneficiary, the primary beneficiary's children, grandchildren, spouses or entities controlled by the primary beneficiary).

Testamentary trust wills provide two main advantages for the beneficiary:

Income tax

In other trusts that are established during someone's lifetime penalty tax rates and low tax-free thresholds apply to any income earned by minors (children under 18 years of age). Under testamentary trusts these penalty rates do not apply. This enables income to be distributed among minors as well as other beneficiaries with low marginal tax rates in the most tax effective way.

For example, if an adult receives assets under a will that, when invested, generate income of \$60,000 he may end up paying tax at the top marginal tax rate. If, however, he receives those same assets by way of a testamentary trust that he controls and has three young children, he can split the income so that each child receives \$20,000. Each child is then taxed with the adult tax free threshold and at adult marginal tax rates. The tax savings would be significant.

Asset protection

Where a beneficiary is at risk of being sued or getting into financial difficulties, a testamentary trust provides protection from assets being taken by creditors.

In the event of a marriage or relationship breakdown, it may also be possible to protect the assets held in a testamentary trust from the former spouse or partner in any property dispute.

Appointing a Guardian

If you have children under 18 years of age you may also wish to nominate someone to act as their guardian. The guardian makes decisions about the care and control of the children including issues relating to health, education and religion. Most parents intend that the appointment of a guardian in their will would only arise in the event of the death of both of them. Where a dispute exists the Family Court has the power to intervene.

Whilst the same person can be both the executor and the guardian, there is some advantage in keeping the two roles separate. It provides a degree of accountability. As a starting point, it may be best to have the guardian as co-executor with another person.

Changing a Will

Once a will has been signed it remains in force until it is changed or revoked (ie cancelled). You should never make any alteration to the original will document after it has been signed. If changes are needed a fresh will is usually required. However, if minor alterations are needed, these can be done by making a codicil. This is a separate document which refers to the original will and specifies the changes to be made. The requirements for a valid codicil are the same as those for a will.

Marriage and Divorce

If you made a will before you married, it will automatically be revoked when you marry unless the will was made in contemplation of marriage.

In the event of a divorce being granted, any gift or appointment in favour of a former spouse in your will is automatically revoked. However, the Court has the discretion to declare the gift or appointment still valid if it is satisfied that the person making the will did not intend the divorce to revoke the gift or appointment.

Challenges to a Will

Under the Family Provision Act, certain people may apply to the Court if they have been left no, or inadequate, provision in a person's will. The categories of eligible people are:

- spouse (including de facto spouse)
- a person living in a domestic relationship with the deceased
- children
- former spouses
- a grandchild who was at any time wholly or partly dependent on the deceased
- a person who was at any time a member of the same household as the deceased and was wholly or partly dependent on the deceased.

In deciding an application under the Family Provision Act the Court must consider whether the deceased made adequate provision for the applicant's proper maintenance, education and advancement in life.

Important note: This information sheet is not intended to be comprehensive and professional advice should be obtained before taking any course of action.

