PRACTICE GUIDE

# Why make a Will?

**A will gives you control. A will gives you options. A will means that you can give other people opportunities. 'It is too expensive'; 'everything I own will go automatically to my spouse or my children'; or 'my assets are too insignificant': these are common misconceptions.**

How often in your own life have you thought that you would have done something – taken a journey, taken a course –but you couldn't because you didn't have the money? A will can allow others to enjoy opportunities that you never had. In essence, a will is the tool that allows you to pass on your possessions to benefit others.

The only certain way to ensure that your spouse, partner or relative, etc. inherits what you intend is by making a will. If you die without having made a will, the intestacy rules apply in an arbitrary manner, particularly if there are no children. This may lead to your spouse having to share your estate with relatives (e.g. brothers and sisters, aunts and uncles) whom you may never have intended to benefit.

For example, Adam did not bother to make a will, thinking everything would go to his wife, Eve. He left an estate of £750,000, which includes a property worth £650,000 and an investment portfolio. Adam and Eve had no children, and he was survived by his wife and two nasty brothers. Eve is only entitled to the personal effects (furniture, etc), £450,000 and half the balance, giving her a further £150,000. The brothers took £75,000 each. As the value of the property exceeds Eve's entitlement under the intestacy rules, she may have to sell the property to release capital, or take out a mortgage to enable her to pay off the brothers.

At present the intestacy rules do not recognise co-habitees. Therefore, if you live with your partner and die without having made a will, your partner will not automatically inherit any of your estate. The estate will


automatically pass to your surviving family (i.e. children, parents, brothers and sisters) and your partner will have to make a claim on the estate claiming financial dependence if appropriate.

If you have children together with your partner then they will automatically inherit the estate, and both your partner and your children will have to get separate legal representation in order to fight for a share in the estate. This is expensive and obviously a situation that should be avoided. A simple will is all that is needed to ensure that your partner and your children are provided for. The Civil Partnership Act provides a legal registration for same-sex couples, which puts their relationship on par with married couples. Civil partners therefore have the right to inherit if a partner dies without leaving a will. The Civil Partnership Act, however, does not apply to non same-sex co-habitees with the inherent problems mentioned above remaining.

Home-made wills should be treated with caution and should only be used in the most straightforward of circumstances. Some home-made wills can be disastrous, for example,

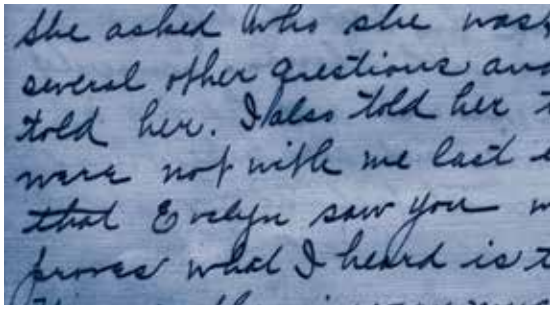
people omit to cover the position if the main beneficiary does not survive; or refer to assets that are not owned on death.

Instead, have your will drafted by a properly qualified professional. At MacDonald Oates LLP we are members of the Society of Trust and Estate Practitioners. Members are specialists in this field and can give expert advice.

This leaflet is a brief guide to making a will. It includes: what a will allows you to do, practical advice on what the process involves, and a section on how more complex family or financial situations can benefit from well-drafted wills.

## Practicalities

You must appoint executors to deal with your estate in the event of your death and hold property in trust, for example while a beneficiary is a minor. These executors have a very important role to play and should be either business-minded family or friends and/or professional advisors.



To some extent executors can act before grant of probate, which is when the probate registry sends out a legal document that allows one or more people to deal with the estate. Three is an ideal number made up of, say, two family members and potentially a professional, which is advisable if the estate is complex or there is any friction within the family.

You can provide for specific funeral arrangements. This is particularly important for some clients. Some people ask for their body to be donated to medical research. Often people who have suffered from prolonged illness want to help reduce other people's suffering by helping to find new treatments. You can safeguard your minor children's interests (i.e. children under 18 years of age) by appointing legal guardians to care for them if both husband and wife have died.

Personal items such as jewellery, paintings and heirlooms can be passed on in the will and by reference to an informal letter of wishes. You can benefit good causes by leaving a legacy or share of your estate to charity, free of inheritance tax (IHT). Charities receive billions of pounds per year through money left to them in wills. It is an important source of funding for them and it means that you can give opportunities to others that you did not necessarily enjoy yourself. Larger estates may be able to benefit from a reduced rate of IHT of 36 per cent if, subject to certain rules, more than 10 per cent of the estate is left to charity.

## Maximising the available IHT nil-rate band

Prior to 9 October 2007, married couples were advised to make best use of both their nil-rate bands for IHT on death. This involved including nil-rate band discretionary trusts in their respective wills. While this ensured that both nil-rate bands were preserved on second death, it often resulted in complex arrangements, especially if a share in the family home was used to fund the nil-rate band discretionary trust.

In October 2007, the government introduced the transferable nil-rate band (TNRB), which provides that the unused proportion of the first to die can be passed to the survivor.

This can best be illustrated in an example: The husband died in 1992. Having made no lifetime gifts he passed his whole estate to his surviving spouse. When the spouse dies in 2013, the nil-rate band for IHT has increased to £325,000. The surviving spouse can leave £650,000 free of IHT.

The simplicity of the new arrangement will be welcomed by many married couples. Couples with existing nil-rate band discretionary trusts should take advice before deciding to redraft their wills, as the flexible nature of the nil-rate band discretionary trust may have other benefits and can offer solutions to complex family arrangements, and also may offer some level of asset protection.

## Wills can offer flexible solutions to practical problems

The inclusion of a trust within the will, whether it is discretionary or gives the surviving spouse a right to income or occupation of the family home, may be attractive for a variety of reasons.

## Family arrangements

Wills can be used to provide for complex family arrangements, for example to include children from previous marriages. A will can give a second spouse the right to occupy the family home, while protecting the capital for children of an earlier marriage. This will ensure that the assets will not pass outside the immediate family and may pre-empt potential challenges to the distribution of the estate.

## Asset protection

An ever-ageing population means that tens of thousands of homes are sold each year to fund the cost of residential care. A carefully drafted will can provide that a share of the family home passes into a trust on first death, which may give the survivor a right to occupy. With care, such a trust will ensure that the capital will be preserved and instead passes to the intended beneficiaries. A trust of this type can be drafted flexibly to allow the survivor to 'down-size' or move property.

Trusts can protect assets should future generations suffer financial or matrimonial difficulties, or the beneficiaries are not mature and responsible enough to own large sums of money. The trustees will be able to take each beneficiary's personal circumstances into account.

There may be ongoing IHT charges and this will have to be weighed-up with the benefit of asset protection.

## Reducing the tax burden

Trusts may have long-term tax advantages in cases where capital appreciation is anticipated to outstrip future increases of the nil-rate band. Trusts can also be used to benefit future generations by potentially by-passing children to benefit grandchildren.

## Businesses

Your will can also direct your business interests (such as shares in a family company) or a farm to those intended, e.g. a son or daughter who has come into the business.

An important IHT relief can apply to these interests giving discounts of either 100 per cent (i.e. complete exemption) or 50 per cent. With your house or other non-business assets you can give assets away without paying an IHT charge if they are 'potentially exempt transfers' (PETs). The main point of interest here is that PETs have to be given away seven years before your death.

With business assets, in most cases, it is only necessary for the individual to have owned these business assets for two years, in contrast with the seven years for other 'potentially exempt transfers'. Therefore, why pay a substantial tax bill when this can be reduced through careful drafting in a will? Business and agricultural interests can often be dealt with through a discretionary will trust, which may offer additional tax savings.

Great care needs to be taken where you plan on giving away an asset with the intention of retaining some sort of benefit from it (i.e. giving away a painting, but leaving it hanging in your house) as this may give rise to income tax implications under the pre-owned asset legislation.

It is of vital importance that trusts are drafted and implemented by a properly qualified professional, as trusts that were not properly set up and administered can be challenged.

## Other considerations

Many people own their house as 'joint tenants'.This is one of two ways in which you can own your house. You could own it as a 'tenant in common'. To own your home or other asset as'joint tenants' can be an inflexible method because the surviving co-owner automatically takes the whole.

Therefore, a co-owner cannot, during lifetime or by will, give these assets to any other beneficiaries, for example to their children. The solution is to hold as 'tenants in common'and, if the holding is already as joint tenants, it can easily be severed by a relatively simple procedure.

The consequence of dying intestate (i.e. without having made a will) can prove both complicated and expensive. At a stressful time for your family and friends such worry, complications and expense can be avoided through making a correct will.

Even if you have already made a will it is important to keep this under review at regular intervals (at least every five years). The world does not stand still and in particular your family circumstances and relevant taxation laws will change.

Remember also that in a two-year period following the death, the terms of a will can be varied or disclaimed by an appropriate document entered into by the persons involved. This may, however, be prevented by changes in the law.

Making a will need not be expensive. Most solicitors and STEP members charge a reasonable fee for a straightforward will. Where the will achieves valuable tax savings this will normally be reflected in the fee, but the savings might be vast.