New Patch

Wills & Probate
Frequently Asked Questions

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1. Who should make a Will?

Every adult can and should make a Will - Minors (under 18) cannot make a Will. The only qualifications necessary are that you are of legal age (18) and of sound mind. If you have a history of mental illness or you are suffering from an illness which may affect your judgement in any way, you should consult a qualified doctor just before preparing your Will.

2. Surely I Can Write My Own Will?

Yes, you most certainly can, however there are significant risks in your doing so and unfortunately, you won't be around to sort it out ! The negative side of writing your own Will are many. For example, it could mean substantial legal fees being spent to put things right, not to mention the considerable upset and confusion caused to those trying to sort it out.

You must be aware that unless a Will complies with Legislation set down to ensure a Will is valid, then a person may, by Law may challenge the Will and your wishes may be totally invalidated. It is also common for 'home written Wills' to be missing important, but at the time the Will was prepared, unforeseen future changes in circumstances.

3. How Long will My Will Last?

Once your Will has been signed and correctly witnessed, it is valid until revoked.
Revocation can be effected in one of three ways:-

- By destroying all copies of your Will .
- Marrying or re-marrying automatically revokes a previous Will unless that Will expressly states that it is made taking into account a forthcoming marriage.
- When you make a new Will it revokes your old Will. We will ensure that your Will contains the relevant clause to revoke all / any Will(s) you have made previously.

4. When Should I Make Or Re-Make My Will ?

If you are over 18 and don't have a Will, or have recently married, you should make a Will
You may need to revise or re-make your Will should one of the following occur: -

<u>Changes In The Family</u>

If there is a death in or addition to your family, you will probably want to add or remove beneficiaries in your Will.

<u>Marriage</u>

Marriage automatically revokes a previous Will (unless the previous Will specifically states otherwise).

Divorce

Getting divorced **does not** revoke a Will, but a former spouse will cease to be a beneficiary.

All clauses naming your former spouse will cease to be valid and where he or she is named as an Executor he / she is not permitted to act as an Executor or obtain Probate of your Will. You should therefore give serious consideration to preparing a New Will.

Same-sex (gay or lesbian) couples who have registered their relationship as a civil partnership have the same tax advantages as married couples. Similarly, if a civil partnership breaks down, the couple face the same legal problems as a married couple (though a legal separation is called a dissolution rather than a divorce).

Separation

Separation does not have the effect on your Will that divorce does, so you may wish to revise it as soon as separation occurs.

Your Finances Change For The Better

You may wish to give your newly-acquired assets to particular beneficiaries

Your Finances Change For The Worse

such that they become insufficient for the legacies you have made

A Name Change In A Beneficiary

If you leave a legacy to a charity or organisation and that charity or organisation changes its name or ceases to exist, and no similar organisation can be found, then your Executors may have to cross that legacy off your Will unless you amend your Will accordingly.

Going to live abroad

You should make a Will in the country where you reside to cover any immovable assets (e.g. property) which you have there in addition to a Will for your immovable assets in England and Wales.

Tax Legislation (The Budget)

People often watch the Budget Speech given by the Chancellor of the Exchequer with interest, to see whether there are any changes in the Inheritance Tax thresholds, the introduction of new Taxes and the provision of any beneficial, Tax Relief. Where your estate is large enough to attract such Tax then you may need to think about revising your Will.

5. Who Can Be A Witness?

Any person who is over 18 can sign as a witness. However, the witnesses should not be people who benefit from the Will or who are appointed Executors (or the husband or wife of one of these people).

If you witness a Will and you are named as someone who will benefit from it, you will lose your right to that benefit when the person dies.

Special rules apply in certain situations e.g. if a blind person or someone who can't read or write wants to make a Will.

6. Can My Children Inherit?

Children cannot inherit until they reach the age of 18; below this age, the funds are held in Trust. If you think 18 is too young for your children to inherit a large sum of money, within a Will, you can specify that they not receive the capital sum until a later age.

They will, however, be entitled to receive any income from the trust fund as soon as they reach 18. Apart from this, the Trustees decide what income and/or capital can be used for the benefit of the children e.g. school fees.

7. Can An Executor Be A Beneficiary?

Yes. Often the main beneficiary is one of the executors and indeed we advise this.

8. Do I Need A Solicitor To Act As Executor?

No. A clause may be inserted in your Will which authorises your appointed Executors to hire a solicitor (whose fee is paid out of your estate and not by them!) if they think they need one to help with the administration of your estate.

9. Do I Need To Nominate Guardians In My Will?

You do not have to nominate Guardians, but a Will can be a convenient place to do so. Without nominated Guardians, the courts will decide who will look after your children.

10. Do Married Couples Need Two Wills?

If you are married, both you and your spouse should each make a Will. Where both details are identical ' Mirror Wills' should be made.

11. Will I Have To Pay Inheritance Tax?

The first £325,000 of your estate will pass free of IHT, this is known as the Nil Rate Band personal tax allowance. The remainder will be taxed at 40%. (these figures are subject to change)

12. Is There Anything I Can't Leave In My Will?

Firstly, you cannot leave anything in your Will which you do not fully own. So, for example, if you jointly own a property under a Joint Tenancy with somebody then upon your death your share automatically goes to the surviving co-owner(s).

However, if you own the property under a Tenancy In Common (which means you each own a specified share) then you can give your share of the property to whoever you wish e.g. you can leave it in your Will.

If you have a life insurance policy, it will generally be expressed to be for the benefit of a named person and will therefore not pass into your estate when you die. So you do not need to mention it in your Will.

Your pension rights may similarly pass outside your Will in the same way - your employer or pension provider should have more details.

13. In What Countries Will My Will Be Valid?

A Will is valid for immovable assets (e.g. property) in England and Wales **only** and movable assets (e.g. bank accounts) in most other countries.

14. What If Somebody I Leave A Gift To In My Will Dies?

If somebody you have left a specific gift (item or money) to fails to survive you by 30 clear days, then that gift goes back into your estate as if it had not been bequeathed. Any beneficiary of your Will who dies before they receive their legacy but more than 30 days after you do, will receive their legacy posthumously and the legacy (money or gift) will form part of their estate.

If somebody you have left all or a portion of your Residual Estate to fails to survive you by 30 clear days, then their share is either divided among the other beneficiaries of your Residual Estate so that those remaining receive their shares in the same proportion to each other as before or (if there are no co-beneficiaries) it passes to any substitute Residual Beneficiaries you have nominated.

15. What If I Want To Leave People Out Of My Will?

If you intend to exclude any of the following from your Will, then you should be aware that under the Inheritance (Provision for Family and Dependents) Act 1975 they can legally contest the Will if they are excluded or under-provided for:-

- your spouse or an ex-spouse who has never remarried
- a partner (if you have been living together for more than 2 years)
- a child or stepchild of yours, or any other financial dependent

We would advise you, in such circumstances, to write a separate letter (often referred to as 'an Expression of Wishes') explaining your reasons for excluding someone from your Will.

The letter / expression should then be stored with your Will and should it become necessary for your Executor to defend your Will in the future, your letter /expression, can be read out in Court and provided your reasons are valid, will have the effect of decreasing the contester's chances of winning.

16. What If I Die Without Making A Will?

Many people think that their Estate will go to their partner when they die. This is rarely the case. For Example, if you are living with but not married to your partner, they will receive nothing if you die without making a Will

Even if you are married to your partner, he or she may not receive the entire Estate and worryingly, may not receive enough to maintain their current lifestyle.

When you die 'intestate' (without having made a Will) then your loved ones may not even get to control the administration of your estate as the management of your estate is instead placed in the hands of Administrators appointed by a court.

17. What Can I Do If I Think There Is Something Wrong With The Will?

The most common reasons for a will not being valid are when:-

- the person who made the will did not get their signature witnessed;
- the witnesses were not together when the will was signed; or
- the person who made the will got married after making their will.
- If one of the witnesses is a beneficiary to the will, they lose the right to what the Will

You can lodge a 'caveat' at a Probate Registry to 'stop probate' or Letters of Administration being granted if:-

- you think there is something wrong with the will; or
- someone is applying for letters of administration when they don't have the right.

though you will need to discuss this with us further if you find yourself in this position.

Other reasons may make a will invalid, including:-

- the person was not mentally capable when they made the will; or
- they made the will under 'undue influence' from some other person

however, it is very difficult to prove that a will is invalid and you would normally need to produce medical evidence showing that a person was mentally incapacitated when they made their Will, and again, you will need to discuss this with us further if you find yourself in this position.

- If you get married or register a civil partnership, unless you mention your forthcoming marriage or civil partnership in the Will.
- If you get divorced or dissolve your civil partnership after making a Will, anything that you specifically mention in the Will as going to your former husband, wife or partner is ignored but the rest of the will is still valid.

18. Can A Will Be Contested?

Yes a Will can be contested.

Even if the Will has been properly executed and the person who made the Will has died, there are circumstances in which it may not be a final guide to the distribution of the estate, these are:-

<u>Deed of Variation</u>

The beneficiaries of the Will may decide to enter into a Deed of Variation within two years of the date of death.

While this is frequently carried out as a tax planning exercise, it can also be carried out by families (where all the potential beneficiaries agree) who consider that one or other of the people in the life of the deceased was not properly provided for in the Will.

Applications under the Inheritance Act 1975 (Provision for Family and Dependents)

Where there is not a Deed of Variation, it is still possible for one or more of those who believe that the Will has not made proper provision to make an application under the Inheritance (Provision for Family and Dependents) Act 1975 to a Court for an adjustment of the assets.

Application must be made to Court within six months of the date of the grant of probate e.g. the date that the Will is officially validated by the Probate Registry, or possibly later if the Court agrees.

Who can apply?

Former Spouse - unless barred on divorce (i.e. the divorce was not in 'full and final settlement'), a former spouse has the right to apply to contest a Will.

Dependents. Traditionally 'Dependents' included, children or stepchildren and cohabitees, however, all of these have until now had to show some financial dependence.

Since 1st January 1996, cohabitees who have lived in the same household as the deceased 'as the husband or wife of the deceased' during a period of two years ending with the death can now claim automatically.

The Court will look at various factors, including the age of the applicant, the relationship, the contribution made by the applicant to the welfare of the family, including any contribution made by looking after the home or caring for the family. There is no strict definition of 'family' and it is quite clear that stepfamilies would be included.

Such a cohabitee need not show financial dependence though he or she is still not in the same, strong position as a spouse, since a cohabitee will only receive provision for maintenance, whereas spouses receive reasonable provision whether or not it is intended they should have maintenance.

19. What If There Is No Will?

An 'intestacy' arises where there is no valid Will or there may be a 'partial intestacy' where the deceased had disposed of part but not all of his/her estate and there are rules, governing division of estate under these circumstances.

However, there is only automatic provision to inherit if you are directly related i.e. spouse, child, parent, brother or sister etc. If there is no Will there is no automatic provision for stepchildren, or stepparents and if there are no relatives surviving, the estate can pass to the Crown.

Provision may then be made for dependents and others, whether related or not, for whom the deceased might reasonably have been expected to make provision.

If the intestacy arises because the Will was not valid for some reason, those who would have inherited if it had been valid obviously will have a strong claim for a payment. This applies to cohabitees and indeed anyone else who was a member of the deceased's family, such as stepchildren.

The Inheritance Provision for Family and Dependent Act 1975 also allows claims to be made to alter the application of the intestacy provisions if proper financial provisions are not made.

Those entitled to benefit can also enter into a Deed of Variation, if all agree, where there is an intestacy.

20. What Can I Do If I Think The Will Is Unfair?

If you are unhappy because you have been left out of a will altogether or because you have been left without 'reasonable financial provision', you may be able to make a claim under the Inheritance (Provision for Family and Dependents) Act 1975. But you can do this only if you are:

- the husband, wife or civil partner of the person who has died;
- the former husband or wife of the person who has died, if you have not remarried or given up your claim when you got divorced;
- a partner who lived with the deceased for at least two years immediately before the death;
- a child of the person who has died;
- a person who was treated as a child of the family by the person who has died when they were married (normally, a stepchild); or
- someone who was totally or partly maintained (supported financially) by the person who has died.

If you think you may be able to claim against the estate because you are in one of these groups, it is very important for you to seek solid legal advice as claiming against an estate is complicated and there is no guarantee that a court will agree with your claim. The court will base its decision wholly on the circumstances of the case.

There are time limits and other conditions you need to know about when making such a claim and you must lodge your application within six months of Probate or Letters of Administration being granted.

You must also be fully aware that you could face a large bill if the court refuses your application or does not decide that the costs should come out of the estate.

21. Can My Estate Be Taken Away From My Spouse To Pay Care Costs?

The short answer is "yes it can". If your spouse has to go into Local Authority Care then the authorities can take all but the last £23,250 of his/her assets to pay for that care. There are however a number of options available to you (depending on your circumstances) where you can take measures to protect some or all of your Estate e.g. by making a 'Discretionary Trust with Life Interest in Residue' Will (in this case your spouse does not own any of your estate and therefore the authorities can't touch it) or by leaving your share in the marital home to your spouse as a 'right to live' gift (again, your spouse will not own your share in the house and therefore the authorities can't touch it).

22. What Is Probate?

Probate (or more specifically 'Probate of the Will') is an official form that gives the Executors of the Will the right to deal with the assets and property of the dead person. When you show the Grant of Probate to a bank, for example, they know they are dealing with the person who has the right to handle the estate, and they will allow you to withdraw money from the dead person's account.

When you apply for Probate, you are promising the Probate Court that you will deal with ('administer') the estate as set out in the Will and according to law. If you do not comply with the requirements set down in the Will, you will be in trouble with the court (and with the people who should benefit from the Will).

Probate makes sure that the Executors carry out their task properly and when there is no Will (or there are no Executors named in the Will or the Executors have died), the Probate Form is called 'Letters of Administration'.

23. Do I Always Need To Get Probate?

In some cases, you don't need to apply for Probate, for example:-

- When the person who has died left very little (say, belongings and money amounting to less than £5,000);

- everything they owned was held in joint names with someone to whom their share passes automatically (normally a husband or wife); or
- any bank or building society accounts that the person had contain less than £5,000 (though banks and building societies have the right to insist on Probate in this case).

However, you will need to apply for Probate if the person who died had:

- any bank, building society or National Savings accounts with more than £5,000 in them;
- Stocks or Shares; or
- Property or land (unless it is owned as a joint tenancy and so passes automatically to the other owner).

You may also have to apply for Probate if the person had any life insurance or term insurance policies that are paid to the estate. Some kinds of policy say that they will be paid straight to the beneficiaries of the policy (rather than to the estate), and you do not need probate for these.

You will have to apply for probate if the person who has died gave away large gifts or sums of money (which, with the person's other assets, total more than a certain amount, called the 'nil rate band') in the seven years before they died. If so, inheritance tax must be paid on the amount over the nil rate band. The amount of the nil rate band is reviewed each year and is subject to change.

Even if these gifts were not worth more than the nil rate band, their value must be added to the assets of the dead person, because the amount of inheritance tax is based on the value of the estate plus the value of any gifts made in the seven years before they died (excluding certain annual allowances).

There is an important exception to the seven-year limit on gifts: if the person who died gave away their home but continued to live in it rent-free, its value will count towards the assets on which inheritance tax must be paid, regardless of when they gave it away. n most cases where there is no will you must apply for 'Letters of Administration, which serve the same purpose as probate.

You apply for a Grant of Letters of Administration in the same way you would apply for Probate. However, as with probate, you may not have to apply for letters of administration if the person's estate was not worth very much.

24. How Do I Apply For Probate?

You may apply in person for Probate or Letters of Administration, or you may instruct a solicitor or other professional, who can apply on your behalf. Your application must be made to:-

- the Principal Registry (in London); or
- a District Probate Registry (in other cities and many large towns).

The Registry can send you information packs. These include probate application forms and information on how to fill them in. You can also talk to registry staff if you are having difficulty filling in a probate application.

25. What If There Isn't Enough Money To Pay For The Funeral?

By asking a funeral director to conduct the funeral, you make a contract agreeing to pay for the funeral. This means that, if you are the executor or administrator, you should do this only after you have made sure that there is enough money in the estate to pay for the funeral. Otherwise, you should be willing to pay any part of the bill that won't be covered by the estate.

If you need to arrange a funeral when there is not enough money in the estate to pay for it and you are receiving a means-tested benefit, you may be eligible for a Funeral Payment grant from the Social Fund. For more information about this, contact your Local Social Security office.

26. What If There Isn't Enough Money To Pay The Person's Debts?

When someone dies, their debts don't die with them and they have to be paid out of the person's estate. If you are administering an estate, you must make sure you have paid all the debts before you pay the beneficiaries.

If you are not sure what the debts are, you need to advertise in the London Gazette and a local paper for anyone who may have a claim on the estate, and then wait two months before paying the beneficiaries.

The London Gazette is a weekly government publication that contains various legal notices. You should be aware that you could become liable (responsible) for the debts

if you pay the beneficiaries without having cleared all the debts first. You may also have to submit a tax return for the person who has died. If there is not enough money to pay all the debts, they must be paid in a particular order:-

- the funeral expenses and 'testamentary' expenses (those to do with dealing with the will);
- any debt secured by a mortgage on property;
- HM Revenue and Customs;
- the Department of Work and Pensions, who deal with social security (you may have to refund any over-payment of benefits); unpaid pension contributions or wages.

If all the debts can be paid, but there isn't enough money left to pay everything set out in the will, the legacies (those where a specific amount is mentioned) will be paid first, and the other people mentioned will get what is left over.

If there is not enough to pay all the legacies, the people entitled to the legacies will get a proportion of what they have been left, depending on how much money is available. The other people mentioned in the will, who are supposed to get the remainder, will get nothing.