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Will formalities, typical content and practical effect

Synopsis: How and why make a valid Will.

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Formalities

Any adult person (that is, aged 18 and over for this purpose) or a serving member of HM Forces (even if under this age) and of sound mind, can make a valid Will.

Under English law an individual is, generally speaking, free to decide who should benefit from their estate on death. This is subject to the provisions of the Inheritance (Provision for Family and Dependants) Act 1975 (IPFDA) which allows a spouse or a dependant to apply to the court for reasonable financial provision where the deceased has not so provided under their Will. This can provide limited relief for the surviving spouse and others financially dependent on the deceased.

Until 1995, a co-habitee wishing to make a claim (under the IPFDA) needed to demonstrate not only that they were financially dependent upon the deceased but also to quantify the level of financial dependence.

The Law Reform (Succession) Act 1995 allows a co-habitee, who has lived with the deceased prior to their death for at least two years, to apply for relief under the Act in, generally speaking, the same way as a spouse, i.e. by removing the need to prove financial dependence but leaving the requirement to demonstrate the level of financial dependence.

Since 5 December 2005 registered civil partners have been treated in the same way as married individuals.

The freedom for a person to make unrestricted provisions in a Will is to be contrasted with the forced heirship provisions, such as those applying in Scotland (legitim and prior rights), and similar provisions applying commonly in other European countries. Please see also International aspects below.

The only assets that cannot be freely disposed of are those held jointly, e.g. in England assets held on a joint tenancy basis, when the asset will pass by survivorship to the surviving joint tenant. This will not be so when assets are held on a tenancy in common basis.

The formalities for making a valid Will are prescribed by the Wills Act 1837 as amended.

For a Will to be valid it must be in writing, it must state that it is a Will (or a codicil to a Will), it must be signed and dated and the testator (in the case of a male Will maker) and testatrix (in the case of a female Will maker) must sign it in the presence of two witnesses who must attest the Will in each other's presence and in the testator's presence.

A typical attestation clause would read...

Signed by the [Testator] [Testatrix] on the _____ day of _____ 20___

Signature of [Testator] [Testatrix] _____

Signed by the [Testator] [Testatrix] in our presence and then by us in [his] [her]

		Witness 1	Witness 2
Signature			
Full name			
Address			
Occupation			

The important point to remember is that if a beneficiary under the Will acts as a witness to the Will they will not be able to benefit under the Will. It is therefore extremely important to remember that the Will beneficiaries should not act as witnesses. The same rule applies to spouses/civil partners of beneficiaries.

Another point to remember is that unlike other legal documents such as trust deeds, which can only be legally prepared for engrossment for a fee by a practicing solicitor, there is no such requirement for Will drafting. As a result of this, Wills can be prepared by persons who are not legally qualified.

To ensure the validity of a Will it is absolutely essential to follow the procedures. Incorrect or doubtful execution of a Will has led to numerous court cases at, usually, great cost to all concerned.

There is also a rule that anyone seeking to rely on a Will that he or she has prepared and from which they benefit must provide clear proof that the testator knew and approved of its contents.

In the case of Fuller -v- Strum [2002] the Court of Appeal reiterated that where a beneficiary had prepared a Will at the testator´s request this created an element of suspicion which that beneficiary had to dispel by showing that on the balance of probabilities the Will freely expressed the testator´s wishes.

A 2004 case involving court action by the children of a deceased solicitor against his widow [Sherington -v- Sherington] resulted in the High Court declaring the deceased's Will, under which the widow was the sole beneficiary, to have been invalidly executed. This meant that the intestacy provisions came into effect under which the widow was only entitled to a small part of the estate while the children inherited most of it. However, this decision was later overturned by the Court of Appeal.

This case illustrates the crucial importance of following the correct procedure to ensure the validity of a Will. It also shows that apparently even lawyers dealing with such matters on a daily basis are not immune from getting things wrong. The costs

of this litigation in the High Court alone were reported to be in excess of £150,000 which is increased still further with the Court of Appeal hearing.

Revocation

A Will may be revoked by the provisions of a subsequent Will/codicil, by destruction, by marriage, or, since 5 December 2005, by registration of a civil partnership.

Generally speaking, a new valid Will would automatically revoke any previous Will, although it is recommended that words clearly stating this are in fact incorporated in the Will. It is also recommended that any old document is destroyed. If a former Will is not destroyed and, for whatever reason, the later Will is held to be invalid, then the former Will would still be operative.

A Will is revoked by destruction by the testator or at the testator's instructions and in their presence. Accidental destruction of a Will does not revoke it if it is possible to reproduce it (for example by putting together any torn up pieces where the Will is torn up by mistake).

Under English law (but not under Scot's law) marriage, or the formation of a civil partnership, has the effect of revoking a Will unless the Will itself is made in contemplation of a forthcoming marriage or civil partnership. In such a case, the Will must state that it is made in contemplation of marriage, or the formation of a civil partnership, to a particular person, who must be named, and it must state that the intention of the testator is that the Will shall not be revoked.

Divorce does not automatically revoke all the provisions of a Will.

However, the effect of divorce is that any appointment of the former spouse as an executor/executrix will be of no effect and any gift in the Will to the former spouse will also be ineffective. The legal position is that after divorce or annulment, a spouse is to be treated as having died on the date of divorce or annulment (section 18A Wills Act 1837 as amended by the Law Reform (Succession) Act 1995).

Since 5 December 2005, the same rules apply in the case of the dissolution of a civil partnership.

Common Will content

Commonly a Will would include the following provisions:

- Provision as to burial or cremation.
- Appointment of executors who would also normally be trustees of any trust declared in the Will.
- Provision of specific legacies of cash or chattels.
- Appointment of guardians in respect of minor children of the testator/trix.

- Specific provisions as to any specific assets and the residue of the estate. This could include outright legacies to individuals named in a Will or trust provisions.

Why make a Will - the practical effect of leaving a valid Will

The key advantages of leaving a valid Will are as follows...

Avoidance of intestacy

Where an individual dies without leaving a valid Will, the devolution of their estate is subject to the intestacy provisions of the jurisdiction in which they are domiciled under the general law. Although the intestacy provisions might in some cases coincide with the individual's wishes, in many cases this will not be the case.

In particular, many people are under the false impression that where an individual is married or in a civil partnership, his or her spouse/civil partner will inherit the whole of the estate. While this may be true in some circumstances, (e.g. where there are no children of the marriage/civil partnership and an estate is below a certain value), in many circumstances (e.g. where the spouse/civil partner survives as well as brother(s) or sister(s) of the deceased), the spouse/civil partner will, under the intestacy provisions, only be entitled to a part of the estate.

Making a valid Will is the only way to ensure that those who are intended as beneficiaries will benefit on the individual's death.

Choice of executors

Through a Will an individual will also normally choose their executors and trustees. The people who will deal with the estate of a person who dies intestate - known as administrators - are dictated by the law and may not be the persons the deceased would have selected.

An executor's role includes collecting all the property of the deceased, paying off any debts and funeral expenses and distributing the estate to the persons entitled under the Will. It should be remembered that executors can, to a large extent, act before the grant of probate since they derive their power and appointment under the Will and can act in that capacity from the moment that the testator dies but before a transaction can be finalised the executors must prove their title by producing the grant of probate.

Probate is prima facie evidence that the Will is valid, that it is the last Will and also that any inheritance tax (IHT) payable has been paid. In contrast, an administrator has no such powers to act until the grant of letters of administration is made. Thus, a Will would also ensure that the estate can be administered more quickly and efficiently.

A person named as an executor does not have to accept that role, but in most cases will do so.

Guardians

Under the terms of a Will, guardians of minor children can be appointed at the testator's choice. This should always be recommended where the testator/trix is a parent of minor children.

Choice of trust terms

When drafting the Will the testator can set out the precise terms of the trust and the powers of the trustees.

For example, certain trustees' powers which are implied under statute can be extended or replaced, and special requirements and special powers, for example to distribute capital, pay income to specific beneficiaries, determine in what circumstances a beneficiary may become entitled or lose their entitlement can be included.

Tax planning

Making an appropriate Will may also result in tax savings, under current legislation, both in respect of IHT and income tax.

International aspects

Assets in several countries

Where an individual has assets in several countries, it may be appropriate to have concurrent Wills in each of those countries. Since there is a general rule that a Will will normally revoke a former Will, it is important where a concurrent Will is made that one does not inadvertently revoke the earlier one.

In such cases, a clause should be included to expressly exclude any earlier Will from the effect of the revocation.

It is important to remember that, particularly in respect of any real estate, i.e. land and houses located in other countries, such property is likely to be treated as property subject to the local laws of succession. The rules governing cross-border administration and distribution of estates are mandatory. This means that, for example, any forced heirship rules would apply.

Under French law, for example, it is possible for succession to be governed by two different sets of laws...

- Succession to immovables, which will be governed by the lex situs, regardless of the residence, nationality or domicile of the deceased.

- Succession to movables, which will be governed by the law of the deceased's last domicile.

An example of such a situation would be a UK domiciled and resident individual owning a property in France. The destination of the property on their death will be fixed in that, for example, if they leave a widow and two children, two thirds of the property will pass to the children. This would include children from a former marriage.

Similar provisions apply in a number of other countries and cannot be overridden by any provision in a UK Will.

Non-UK domiciled individuals

Those living in the UK but wishing to claim non-UK domicile on death, should remember that it is important that they should make a Will in the country of their claimed domicile (or in any case not in the UK) and that they should recite in the Will their claimed domicile. There could be a concurrent Will in respect of UK assets, but the main Will should be outside of the UK. The Will should also be regularly updated.

If a non-UK domiciled individual makes a Will under English law, such a Will may only be valid in respect of any real property they own in England and Wales. Even if such an individual were to prefer English law to apply to all their assets, this will not be possible.

This is particularly important to individuals of Arab origin where Sharia law may be relevant and this has very strict rules on succession.

Recognition of foreign Wills

Provided a foreign Will has been executed in accordance with Section 9 of the Wills Act 1837, it can be admitted to probate in England. If this condition cannot be satisfied, such a Will may still be admissible, provided it has been executed in accordance with the laws of the testator's country of domicile (Wills Act 1963, s 1).

The 1973 Washington Convention on International Wills sets out the requirements for such Wills which when complied with are recognised by contracting states. In the UK, appropriate legislative arrangements have been made to put this into effect, but the appointed date has yet to be announced.

In principle the requirements for valid Wills are reasonably similar in most western countries and a Will executed in the UK is likely to be recognised in most of those countries.

One method of avoiding probate in respect of assets held offshore (and therefore avoiding the need to deal with those assets under an individual's Will or perhaps having a concurrent Will in the country of location of the asset) is for the assets to be held in trust. This, of course, will only be possible in jurisdictions that recognise the concept of a trust. In such cases access to the assets would be required and therefore any trust will normally be for the primary benefit of the donor during their lifetime, with further settlement provisions coming into effect on their death.

As long as the assets are held by the trustees and the powers of the donor are not such that they would make the trust likely to be considered a sham, the trust should be effective to avoid probate both outside and inside the UK. However, following the Finance Act 2006, greater care needs to be exercised on "self-settlements". Prior to 22 March 2006, these were neutral for IHT purposes. Now they may give rise to charges under the discretionary trust regime and could also give rise to a gift with reservation of benefit.