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WHAT YOU SHOULD KNOW ABOUT YOUR WILLS - INFORMATION FOR CLIENTS
Walsh West Private Client Legal 2021

10 things you should know about wills

More than half of British adults have not made a will. Of those who have, many have not updated their wills for some time, which is reflected in the soaring number of inheritance disputes heard in the High Court.

Dying intestate — the legal term for not leaving a will — can leave considerable costs and complications for people left behind to deal with, alongside the heartache of grieving. Despite this, research estimates that over 30m people in the UK have still not got around to formalising their intentions.

To help you write your will, so that your estate passes to the people you intend, here are 10 things to consider:

1. Getting married affects your will

The thought of what happens when you die is unlikely to be the first thing to spring to mind when you walk down the aisle, but it is important to remember that all previous wills are revoked from the day you say "I do".

Unless you make a will following your marriage, the rules of intestacy apply. This means that unless you have children, your surviving spouse will receive everything. If you have children, your spouse will receive the first £250,000 and half of the remainder of your estate.

This can result in a problem for couples who marry in later life and have children from previous relationships but want their assets to pass to their children, rather than their new spouse. In these cases, they would need to make a new will reflecting their wishes after marriage, in order to prevent the intestacy rules applying.

Another scenario where problems can arise — often for older couples — is when the validity of a will made after marriage is called into question, either because of mental capacity issues, or because the will wasn't executed correctly.

For example: If the will is found to be invalid, one cannot revert to the previous wills, which are often on broadly similar terms, because they have been revoked as a result of the marriage. Instead, the estate passes on intestacy.

In another example: anyone who is anticipating getting married can make a will before they marry - as long as you expressly state in the will that you have made it 'in contemplation of marriage' naming the person you intend to marry.

2. Review your will if you get divorced

It is always a good idea to review your will at key stages in your life. But contrary to popular belief, when you divorce, your existing will remains valid. For inheritance purposes, your decree absolute has the effect of removing your former spouse from the will completely, although named executors and other beneficiaries will remain valid.

Be aware that this rule only applies to legally divorced couples. It does not apply to estranged spouses — they still benefit if either the will has not been updated, or if their estranged spouse dies without a will.

This can lead to unexpected outcomes. For example, an estranged (but not divorced) couple who have lived apart for many years — even if they lived with new partners — would still benefit from each other's estates if they had not made or updated their wills, but their new partners would not.

Another thing to bear in mind for families with trusts in place for children is that the majority of married couples appoint their spouse as a trustee — an arrangement that will fail upon divorce. This may not be in your best interests. Despite being divorced, you may still want your ex-spouse to be responsible for any trust fund or guardianship of your children that you have provided for in your will."

3. A common law partner will not automatically benefit when you die

There is a growing shift towards couples choosing to live together and have a family. However, no provision is made in the intestacy rules for unmarried partners.

There is also no such thing as a "common law" spouse in England and Wales — a partner is not deemed to be a "spouse" for intestacy purposes unless a couple are legally married or in a civil partnership. Similarly, no provision is made for stepchildren on intestacy, unless they are formally adopted.

You need to make a will if you want your cohabiting partner or stepchildren to benefit from your estate. You can also think about owning assets — property or bank accounts — jointly, so that the survivor inherits that asset automatically.

The will should be drafted carefully to ensure the stepchildren benefit: either by naming them expressly in the will or making sure the definition of children extends to stepchildren; otherwise the law won't recognise them.

4. Check your will has been drawn up correctly

The requirements for what makes a will valid varies from country to country. In England and Wales, a Post-it note with your wishes written on it can be sufficient to count as a will, provided it is executed correctly.

The formal requirements for making a will are that it must be

1. in writing,
2. signed by a testator — or signed by someone else at the testator's direction
3. in the presence of two witnesses, who also sign the will

A valid will could be written on the back of a dirty napkin provided that it was signed by the testator and witnessed correctly.

The signature still has to be handwritten, however.

Many companies are now offering to produce wills online, but for a will to be valid, it still needs to be printed and signed by hand. The Law Commission confirmed last September that electronic signatures can be used to execute other documents, but did not extend this to wills.

There is a move internationally, for example in some US states, to allow a will to be produced online and signed electronically. Other countries are also embracing the fact that most of modern life is now carried out online. In Queensland, Australia, a court has accepted that an unsent text message was considered to be a valid will.

5. Helping a loved one to die could impact your inheritance

The law is very clear on this point in the UK. A person cannot benefit from the estate of someone they have unlawfully killed — this is known *as the forfeiture rule*. This may seem like a law that would not affect many people, but it can have an unforeseen impact.

This scenario is arising more often in the context of assisted suicide, which remains illegal in England. Accompanying a loved one on their journey to an assisted suicide clinic could be considered as assisting in the suicide and lead to a 14-year prison sentence.

Although those who have assisted in the suicide are rarely prosecuted, their actions are still considered an 'unlawful killing' and they are prevented from benefiting from the deceased's estate. This can cause difficulties for spouses and family members, as often those who are helping fulfil their loved ones wish of wanting to die are also the ones who benefit under their estate.

Experts say it is possible to apply to court to ask that the "forfeiture rule" not be followed because of "the justice of the case".

The court will take a number of factors into account in making its decision but practical steps can be taken before death to strengthen the position. These could include the individual making a statement recording the reasons why they wish to end their life and stating that it is their own freely made decision.

6. Your mental capacity will affect your ability to make a legitimate will

This is becoming more of a common issue due to the ageing population — another good reason to make a will and set up a Lasting Power of Attorney (LPA).

It is possible to make an application to the Court of Protection — which has jurisdiction over a person's affairs once they have lost mental capacity — to authorise a "statutory will" for an incapacitated person.

The court is usually willing to authorise this in circumstances where the individual has either never made a will or their circumstances have significantly changed — for example, family members who benefit under a pre-existing have died or assets have significantly changed.

The court is also able to authorise lifetime gifts from the incapacitated person's estate.

An example is: where a very wealthy man suffered from an unexpected cardiac arrest and was in a persistent vegetative state. The Court of Protection approved a statutory will for him. His lawyers then made an application to the Court of Protection for approval of gifts being made now to charities and his family who benefit under his statutory will.

7. Your will can be challenged when you die

There are rules which determine which family members receive a share of your estate if you do not make a will, but there are no rules — unlike in some European countries such as France and Italy — to override the provisions of your will. In theory, you could give all your estate to one person or to a charity and not to your spouse, other family members or dependants.

However, in England and Wales there is a statute that allows certain people to claim financial provision from an estate where they have been left nothing or too little.

If someone feels they did not receive reasonable financial provision from the deceased's estate, they may be able to bring a claim to benefit from the estate under the Inheritance (provision for family and dependants) Act 1975.

A claim can be brought by a wide variety of people including a spouse, former spouse, people living with you, children including adult children or someone who was maintained by the person who has

died. Be aware that claims brought by anyone other than a spouse will need to demonstrate financial need.

People are often surprised to learn how far reaching the act can be. Adult children who have been estranged from their parents for years can bring a claim, even in cases where the parents explicitly say in the will that they do not want their child to benefit.

Another increasingly common situation is where an individual has been helping out a friend or neighbour financially. On the death of the individual, the friend or neighbour can bring a claim on the basis that they were maintained by that individual prior to their death.

Other cases where a will can be challenged are where a promise has been made to someone, they have relied on that promise and in relying on that have suffered a detriment. In this situation, a claim can be brought to have that promise fulfilled. This is known as "proprietary estoppel".

A classic example is where a parent or employer has promised a dependent or employee that they would inherit the family farm on their death and as a result the person has worked on the farm for very little money. After death, if the will does not reflect this promise, they can apply to court to have the promise fulfilled.

The phrase 'fraudulent calumny' is not one that lay people or solicitors regularly come across but was the grounds on which a will was found to be invalid in a 2017 case. 'Poison in the ear' as it is otherwise known involves giving the testator false information on which they then rely to make decisions about their estate and will.

In the 2017 case, as an act of revenge, the testator's daughter misrepresented facts about her sister, which led to her mother overwhelmingly favouring the first daughter in the will.

The court put aside the will after establishing the dishonesty and deceit, and suddenly this little-known ground for contesting a will is back at the forefront of practitioner's minds.

8. The contents of your will won't stay private after you die

Following death, wills become public documents — apart from certain members of the royal family and estates that have very little tax due. Someone's will can usually be found once grant of probate has been issued by searching the probate records. This can be done online for £1.50 on the Gov.uk website.

You may therefore not want to write anything in your will that you wouldn't be comfortable with people seeing after your death.

If you want to keep certain things confidential then the best course is to write a letter of wishes to go alongside your will. Although this will be kept private from public view it is not legally binding — it is only be an expression of your wishes."

9. Your will could be affected by the 'commorientes' rules

In the case of a simultaneous death — for example, a couple who are killed in a car accident — if it cannot be determined who died first, it is deemed to be the eldest for inheritance purposes. This is known as the commorientes rule.

This issue does not come up very often, however it can have a huge impact on how assets pass. In a case, reported last year, a married couple were found dead in their home but it was not clear who had died first. Each had children from previous marriages. If the husband was found to have died first, his joint assets would pass to his deceased wife and subsequently his wife's children. Whereas, if the wife died first, her joint assets would pass to her deceased husband and subsequently his child.

Despite expert evidence, the court held that it could not be determined who had died first. As the husband was older, he was deemed to have died first and the wife's children benefited from the joint assets.

This was an all or nothing battle for the parties involved which no doubt cost them their relationship and huge legal fees. But it could have been avoided by effective wills, advice and planning.

10. Donating to charity via your will can reduce your tax bill

People often leave charitable gifts in their wills, but it is not widely known that this reduces the amount of inheritance tax that will need to be paid on their estate.

Those giving away 10 per cent of their net estate will reduce the rate of inheritance tax they would have to pay on the remainder of the estate from 40 per cent to 36 per cent.

Giving to a UK charity is free of any inheritance tax and is a good way to reduce taxable estate during your lifetime. Donating as much as 10 per cent of your total estate will reduce any inheritance tax on the remaining estate by 10 per cent, with the gift itself being free of IHT.

For initial advice about Estate Planning including Lasting Powers of Attorney, Wills, Trusts and Probate; call our team on 0203 488 7503, 01992 236 110 or contact us by email at welcome@walshwestcca.com or via our website www.walshwestcca.com and we will help you.