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FACTORS TO BE CONSIDERED WHEN MAKING A WILL

What happens if I do not have a will?

If a person dies without having made a will or if the will is invalid for whatever reason, that person is said to have died "intestate". If there is a valid will, but part of it is invalid then that part is dealt with as if there was intestacy. The rules for division of property on intestacy are as follows:

If the deceased is survived by:

- spouse but no children - spouse gets entire estate.
- spouse and children - spouse gets two-thirds, one-third is divided equally between children (if a child has already died his/her children take a share).
- parents, no spouse or children - divided equally or entirely to one parent if only one survives.
- children, no spouse - divided equally between children (as above).
- brothers and sisters only - shared equally, the children of a deceased brother or sister take the share.
- nieces and nephews only - divided equally between those surviving.
- other relatives - divided equally between nearest equal relationship.
- no relatives - the state.

Soundness of Mind

At the time a will is being made the person making the will (the Testator/Testatrix) must be of sound disposing mind. There is a presumption of soundness of mind and any person who wishes to challenge a will claiming that the Testator was of unsound mind must prove that this was the case. The requisite elements when making a will are:

1. That the Testator/rix know that s/he is making a will.
2. That s/he is capable of knowing the nature and extent of his/her estate.
3. That s/he be able to give consideration to those persons who might be expected to benefit from his/her estate and decide whether or not to benefit them.

Revocation of Former wills

A will is revocable at any time by the Testator/rix at any time prior to death. Once a person makes a new will all former wills are automatically revoked. A will is also automatically revoked upon marriage unless that will was specifically made in contemplation of marriage. Divorce does not revoke a will.

Please note that this memorandum is merely a brief summary of matters which should be considered when making a Will and should you have any queries in relation to any issues these should be brought to our attention in order that we may discuss same in greater detail with you. For further information on making a Will, please contact Nuala Ford, Ford & Associates Solicitors, Augustine Court, St. Augustine Street, Galway. Tel: 091 549399 E-mail: info@fordassociates.ie

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Separation of itself does not extinguish succession rights; however, such rights may be extinguished or renounced under a separation agreement or judicial separation.

Extreme care should be exercised when choosing an Executor. While one executor is sufficient it is advisable that more than one be appointed as two trustees are needed where settled land is involved. The best executor is one who knows the deceased in a personal or professional capacity and has an abundance of common sense. It is also advisable that the proposed executor's consent be obtained prior to their appointment. The function of an executor is to extract a Grant of Probate and administer the estate which includes the sale of all assets and the distribution of the proceeds thereof as per the terms of the will.

What are trusts?

A trust is a device you can set up in your will or during your lifetime whereby money or assets are held by a person/persons (Trustee(s) for the benefit of another (Beneficiary). It is often used where there are young children so assets can be held for them until they are 18 (or older) and the trustee can be given powers to invest and deal with the assets in the meantime. Trusts may also be useful for someone with special needs. A trust can set out specifically who the assets are held for and in what shares or you can create a Discretionary Trust allowing your Trustee(s) to decide which people in a designated group get what shares in the trust property at which times they consider best

Young Children

Your will should give directions for the care of children under the age of 18 and how they are to be provided for. Unmarried couples should also ensure that they decide who is to have custody and guardianship of their children in the event of one of them dying. A Guardian is the person who takes over the role as parent in rearing children under 18 years of age. You can appoint a trustee to look after the assets in your estate. Your Executor could also be your Trustee. You should ensure that your Trustees have enough powers to allow them to be flexible in deciding what maintenance and other payments should be made for the benefit of beneficiaries who are under the age of 18 year or who have a mental disability. Generally, your will should provide that your estate will be divided as per your requirements between your children when they reach a specified age. You can arrange for them to receive an income from the estate from a certain age onwards e.g. from 18 years of age. Alternatively, you can set up a discretionary trust for your children until the youngest reaches the age of 18. This provides your Trustees with full power to apply capital and income at their discretion for the benefit of your children. It is up to the Trustees to decide how much each child will receive. A discretionary trust can be useful where beneficiaries are young or suffer from a disability.

Assets

When contemplating making a will one should keep in mind that it is important that after your death your Executors will have details of all your assets and know where to find bank books, share/savings, deeds and life policies etc and so you should ensure that these are all kept in a safe place and that the location of same be communicated to your Executors.

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Disposition of Assets

A person may by his/her will dispose of all property that s/he is beneficially entitled to at the time of his/her death. The word property herein includes both real (e.g. Land, buildings etc) and personal (e.g. cash, jewellery etc) property.

Joint Property

You may not dispose of property in a will that you do not own. In this regard, difficulties can often arise if you hold assets in joint names with anybody else. This could comprise a joint Bank account or other property in which you are co-owner. These could be held as joint tenants so that on your death the account/property passes to the survivor/s or as tenants in common so that on your death your respective share passes as directed under your will.

Legacies

A Legacy is a benefit under a will. There are various types of legacies as follows:

Specific legacy: This is a gift for specific items such as a wedding ring. Such an item, however, can always be given away by the Testator during his or her lifetime in which case the gift will be adeemed i.e. the legacy is set aside and the beneficiary receives nothing.

General Legacy: This is a gift out of the remainder of the estate after due payment of debts and taxes owed by the deceased and specific legacies. They are usually pecuniary in nature e.g. legacy of €300 to god-child. This type of legacy cannot be adeemed but if the residue is insufficient to pay the debts general legacies will be the first to abate pro rata. For example, if there were general legacies amounting to €10,000 and after due payment of debts the balance remaining was €7,000 then each legatee would get 70% of his/her legacy i.e. each one is proportionately reduced.

Demonstrative Legacy: This is a mixture of a specific and general legacy e.g. "I give to my nephew John €500 out of my bank account with Bank of Ireland in Mainguard Street". This type of legacy is not adeemed, in that if the fund is insufficient to meet the legacy then it becomes a general legacy and assumes all the characteristics of a general legacy. It is, however, liable to abatement as referred to above.

Lapse: If a beneficiary predeceases a testator/rix the legacy to him/her under the testator's will fails and the property falls to the residue/remainder estate.

Conditional bequests: A Testator may impose a condition on a bequest in his/her will and in this regard if the beneficiary fails to comply with the condition the said bequest will be forfeited.

Charitable bequests: It is necessary that when one wishes to benefit a charity under his/her will that the charity be sufficiently identified. If a charity is carelessly or incorrectly described or if it has ceased to exist at the death of the Testator/rix the bequest will not fail and same will be given to a charity of similar nature.

Spouses – restrictions where a will is made

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Legislation confers on a surviving spouse a legal right to a share in the deceased's estate. The amount of the share depends on whether a testator has left surviving children. If s/he has, then the surviving spouse is entitled to a one third share of the estate. If there are no children then the legal right share is increased to one half. The children have to be children of the testator. They do not have to be children of the spouse. This right takes precedence over all other bequests.

If you find that your spouse has made a will that does not recognise your legal right share, you may still claim your right. You do not have to go to court; the executor or administrator is obliged to grant you your share.

Your spouse is the person to whom you are legally married. Non-married partners have no legal rights to each other's estates. A church annulment has no legal status and so does not change the status of a spouse. If a partner in such an annulled marriage subsequently "remarries", this is not a legal marriage and the parties have no rights vis a vis each other. Partners may, of course, make wills in favour of each other but such wills may not negate the legal right share of a spouse.

The family home

If the family home is held by both spouses as joint tenants, the surviving spouse automatically inherits the deceased spouse's interest. In the case of an unmarried couple where the family home is held as joint tenants, the surviving partner automatically inherits the deceased partner's interest but may be liable for inheritance tax, unless the surviving partner qualifies for dwelling house tax exemption.

The surviving spouse may require that the family home be given to him/her in satisfaction of the legal right share or the share on intestacy. If the family home is worth more than the legal right share then normally the spouse would have to pay the difference into the deceased's estate. However, the surviving spouse may apply to the court to have the dwelling house given to him/her either without paying the difference or by paying such sum as the court thinks reasonable. The court may make such an order if it thinks that hardship would otherwise be caused either to the surviving spouse or to a dependent child.

Children

Children are not entitled to any share of the deceased parent's estate where the deceased parent died having made a will. Children of any age may apply to the court if it can be shown that you have failed as a parent in your moral duty to make proper provision for them in accordance with your means. If this claim is successful, the court will make provision for them out of your estate. Children cannot make a claim against a surviving parent (being that child's parent) if the entire estate is given by will to that parent.

Non-Marital children have similar rights to make claims against the estates of their unmarried parents. Where a child becomes legally adopted, the adopted child can claim against the estate of the adopters.

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If a Testator/rix does not wish to benefit a non-marital child or indeed any child of theirs it is possible to provide for this in the will, however, it must be noted that proper provision should be made for this child during its life if one wishes to avoid an application being made by that child to the court on the death of the parent claiming that they are entitled to a share in the estate because the parent failed to properly provide for them during their lifetime.

Advancement

Advancement is a gift intended to make permanent provision for a child. If it has been established that a child has received such an advancement, then that advancement is to be treated as having been made towards satisfaction of the Child's share under the will, subject to any contrary intention either in the will or established from the testator's conduct during his/her lifetime. It is possible, however, to insert a clause in the will that negates this presumption and effectively provides that any advancement during the child's life is to be disregarded when distributing the parent's estate.

Capital Acquisitions Tax

If you leave property by will to someone other than a spouse then they must pay Capital Acquisitions Tax (formerly Inheritance Tax) on their share, currently at the rate of 33% in respect of gifts and inheritances taken on or after 6th December 2012. Estate planning is important in the reduction or avoidance of Capital Acquisitions Tax (C.A.T.), which is a tax on gifts and inheritances. There are certain thresholds under which C.A.T. will not be payable and these thresholds vary depending on the relationship the beneficiary has with the Testator/rix. To view the most up to date threshold tables, please see <http://www.revenue.ie/en/tax/cat/thresholds.html>.

The amount of the tax-free threshold is exempt from Tax and it is the amount in excess of this threshold that is liable to tax. However, if you have received gifts or inheritances since 5th December, 1991 they are added together (aggregated) with the inheritance. The thresholds are lifetime thresholds with the result that the tax-free threshold can be reduced or removed. The tax-free thresholds increase every year in line with inflation.

What tax reliefs are available?

There are various reliefs available and it is important to seek professional advice when making a will to ensure any reliefs available are utilised. The following are some of the said reliefs:

1. Business Relief

Provided certain conditions are met you can pass on business assets (to include goodwill and a business premises) by Deed or will and the beneficiary can claim business relief which means that for tax purposes the value of the business passing is reduced by 90% and the person taking the business assets (beneficiary) is deemed to have taken same at only 10% of their actual value. This relief can be clawed back if the beneficiary sells/transfers the business assets within six years of obtaining same or if the business ceases. The deceased

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must have owned the business assets for a period of at least two years prior to his/her death.

2. **Agricultural Relief**

A similar relief is available for agricultural property. Provided certain conditions are met, the value of agricultural property passing by deed or will is reduced by 90%. To qualify for the relief the inheritance must consist of agricultural property (or can be a legacy with a condition that the monies be invested in agricultural land within two years of the inheritance). The beneficiary must be a farmer to be eligible for the relief (i.e. 80% of their assets must be agricultural). Again, there is a claw back if the beneficiary sells/disposes of the lands within six years of the inheritance.

3. **Dwelling House Relief**

Where a person (the Donee) takes a lifetime gift or inherits a dwelling house which has been owned by the deceased for at least three years prior to the Gift or Inheritance, and has been occupied by the Donee as his/her main residence for the three years immediately prior to the gift/inheritance, the dwelling house is exempt from Gift or Inheritance tax

Restrictions: This exemption applies to a house plus a garden of up to one acre. The beneficiary must not own or have any interest in any other dwellinghouse. If the beneficiary is under 55, there will be a claw back if he/she sells the house within 6 years of the Gift/Inheritance but allowance is made if the beneficiary replaces the house with another within this period.

Where this relief applies, a beneficiary does not have to bring into account, in determining their Class Threshold, the dwelling in relation to any future benefits they take from the same deceased or a person within the same tax Class.

4. **Favourite Nephew/Niece Relief**

A nephew or niece who has worked substantially on a full time basis in the business or farm being passed on to them for five years prior to the Gift/Inheritance, may be entitled to the same Class Threshold as a child, provided certain circumstances are met.

5. **Minor Child of a Deceased Child**

Grandchildren taking a benefit from their grandparents usually fall in to the Class B Threshold but where they are under 18 and they are children of a pre-deceased child of the Donor, they can claim the Class A threshold.