

# *Where there's a Will ...*

Darren Sylvester outlines the points to remember when preparing a Will

## **Introduction**

A Will may be described as a legal document whereby a person instructs and directs what will happen to them and/or their property (estate) after their death. Such instructions and directions are carried out by named executors (sometimes referred to as personal representatives) whom the Will indicates. A person who dies and leaves a Will is said to have died 'testate'; a person who dies and does not leave a Will is said to have died 'intestate'.

While death can be the end of a person's troubles on earth, it is often said that death is also just the beginning of troubles for those whom are left behind. Many persons of ethnic minority origin seem to die intestate, using excuses like "I haven't got round to doing it yet"; "I'm not going to tempt fate"; "It will all go to my next of kin anyway". Such phrases, while being unacceptable, only serve to cause further complications for families at an already difficult period of time and, in my experience, tend to fuel any low-lying conflict between families to an even greater extent.

## **The Last Will and Testament**

Anybody over 18 years of age, of sound mind and who holds the necessary testamentary capacity (i.e. they intend to make their Last Will and Testament, believe they are doing so, and are not labouring under any defect of reason which could prevent them from so doing) can formally make a Will. A Will should reflect the maker's (testator's) true wishes and not, for example, the expressed or implied wishes of the family or indeed any member thereof. Once the testator's wishes are reflected in the Will, the testator will then read, sign and approve its contents.

The Wills Act 1837, s.9 sets out the formalities of making and signing a Will, which are:

- i. the Will must be in writing (so a video Will would not be valid);
- ii. it must be signed by the testator or some other person in their presence and at their direction; and
- iii. there must be signatures from at least two witnesses, who both saw the testator sign, and who then both signed in their presence and in the presence of each other.

Should a Will fail to meet all or any of these requirements, then it will be invalid. Unless a Will under this category is amended/re-drafted before the testator dies, the testator will be said to have died intestate.

As regards witnesses, any adult can witness a Will (except persons whom are blind). The precise function of witnesses is to witness the testator sign their Will, with them signing the testator's Will thereafter.

Again, it is important to stress the fact that a Will is not valid if a witness or witnesses do not see the testator sign their Will; or if a witness or witnesses sign the testator's Will first, with the testator signing the Will thereafter. A witness or witnesses are independent and impartial persons to whom the content of Will has no relevance: they are only present to witness the testator sign the Will. Accordingly, and due to their status as witnesses, a witness or witnesses, along with their spouses, are barred from benefiting under the Will in which they are witnesses to.

### **What a testator should consider before making a Will**

- Would an executor have authority to deal with disputes, if any, until all matters under the Will were successfully finalized?
- Is there to be a gift from the residue estate? The residue estate is the remainder of the estate that has not been specified to be distributed. For example, if at the time X made his Will he had an estate worth £500,000/= to be distributed, and on his death he wished to distribute £100,000/= each to five beneficiaries, should he subsequently win £1,000,000/= on the National Lottery and fail to change his will accordingly to reflect the current and correct value of his estate; or if there is no clause in X's Will to reflect what will happen to his 'residue estate', then the £1,000,000/= won on the National Lottery cannot be distributed under the Will, but will be distributed as if X had died intestate;
- Should a particular beneficiary be given the first choice to purchase a specific item from the estate and, if so, on what terms? To avoid complication or any ambiguity arising, should any testator wish for such a provision to enter into their Will, then it is better for the testator and other such persons to enter into 'precise negotiations' before-hand so that the terms of such a choice are clear and concise;
- Does the Will revoke all former Wills made by the testator?
- What is to happen should a beneficiary die before a testator? Logic dictates that a dead person cannot inherit under a Will, therefore, in circumstances where a beneficiary is already dead when a testator dies, any gift made will fail. In this instance, the property that ought to have gone to the [deceased] beneficiary will remain in the testator's estate and be amalgamated with the remainder of the residue estate unless the gift was to a child or grandchild of the testator's, in which case such a gift passes to that child's or grandchild's children;
- In the event there are to be any adopted, legitimate and illegitimate children within a Will – to avoid confusion, it is advised to use their full name(s) on each occasions for the sake of clarity and precision, as opposed to referring to such persons using the generic term 'children';
- The Will should name the executors – substitutes may also wish to be named to cover the event of an executor dying/being unable to undertake the task. Two executors is generally regarded as being the ideal number.

Further considerations ought to be should an executor(s) be paid for their services? If yes, then the Will should specify payment and the frequency thereof. Before naming an executor, it is of course advisable that the testator checks whether they are willing and able to be one;

- Think about Capital Gains Tax and Inheritance Tax – for example, assets with the high possibility of gain can be given to a spouse who only has a short time to live. Gifts between spouses are exempt from Capital Gains Tax;
- An executor will acquire the deceased's assets at their market value on death. They are entitled to the personal annual Capital Gains Tax exemption in the year of death and the next two years so it would be advisable, where possible, for executors not to prolong the distribution of an estate over and above the time periods for exemption<sup>1</sup>;
- Executors pay Inheritance Tax at 40 per cent and Capital Gains Tax at 34 per cent on gains after the annual exemption, which current rates are £255,000/= and £7,700/= respectively.

### **Making a Will: imperative steps to be taken**

- Draw up a list of the estate – including assets, land, cars, money, etcetera;
- Draw up a list of beneficiaries;
- Work out who is to receive what, and in what shares;
- Is there land or property outside England and Wales – are two Wills needed?
- Appoint the executors: executors can be beneficiaries under a Will, however, witnesses cannot. If all of the testator's estate is being left for a spouse, then there is no real need for the testator to appoint any executors;
- Deal with all gifts of money and property other than land;
- Deal with 'real property' i.e. land;
- Ascertain who is to receive the residue estate
- What powers are to be given to the executors<sup>2</sup> - a testator may wish to give their executors wider powers via their Will to reduce any ambiguity caused by Acts of Parliament. For example, The Trustee Act 2000, s.29 is silent on whether a sole executor can be paid for their services in administering an estate.
- Can the testator bind the executors? i.e. it would be prudent to consider whether the testator wished to be buried or cremated; have their body or body parts donated, etcetera;
- Keep the Will in a safe place and make photocopies: the executors and family should be told where the original Will is kept.

---

<sup>1</sup> The Administration of Estates Act 1925, s.44 states that personal representatives cannot be bound to distribute the estate within one year of death.

<sup>2</sup> The Trustee Act 2000, s.31 provided that personal representatives may recover all "out of pocket" expenses. Payment of the fees of personal representatives is dealt with by ss 28 and 29 and applies only to deaths after the commencement of the Act.

## Conclusion

Diligent and organized persons will make things easy for their family and/or executors by making a detailed and comprehensive list of all relevant personal information which is likely to be needed after their death. For example, doctor's, solicitor's, accountant's and employer's details; bank/building society details; where the testator's passport, bank books, driving licence, insurance policies, title deeds, share certificates and other important documentation may be located.

This short outline by no means does full justice to this extremely important topic, however, it is hoped that this basic summary has illustrated that 'Where there's a Will, there's a Way': a way of ensuring executors' lives are less complicated in administering an estate that is in accordance with, and full compliance of, the testator's wishes.

Darren Sylvester is a barrister and projects officer of the DONA

Darren Sylvester  
© October 2003

---

*This article has been written for information and guidance purposes only. Neither the whole or any part of its content is meant to be a substitute for obtaining legal advice, or is to be relied upon without first receiving legal advice from a solicitor.*