



Collingbourne
Wealth Management

Guide to Making a Will

Introduction

The first thing to remember about a will is that it has no effect before death and is normally quite easy to alter during your lifetime, but without a properly drawn up will it is unlikely your assets will end up where you want them to go. As well as accurately reflecting your wishes and current situation, a will should ideally provide the flexibility to deal with changing circumstances.

The aim of this guide is to help start the process of gaining an appropriate estate plan. The guide will cover some of the most important decisions that need to be made in establishing a new will, raising some key considerations.

Inheritance tax planning can be divided into two parts- (a) during lifetime and (b) using wills. This document covers the use of wills only, so please refer to our paper "Guide to IHT Planning" for a more complete picture.

Who do you want to be the executor(s) of your will?

Executors perform an administrative role, being responsible for carrying out the instructions left in your will. The main roles of the executor are to account for all the estate's assets and report them to HMRC in order to obtain probate. Once probate has been received, they are responsible for distributing the assets as set out in the will.

It is usual for married couples to nominate their spouse as the first executor. It is advisable to select at least one other executor so the surviving spouse's will still has an executor after first death. Most people usually appoint their children (or closest relatives) and a professional, usually the solicitor who drafted the will. The costs of professional executors can be very high, particularly when costs are set as a proportion of the estate. If a professional is selected as an executor it could be worthwhile securing a contract based on a flat or hourly fee, rather than as a proportion of your estate.

A good solution, where available, is to appoint a close family member who is not a beneficiary (or major beneficiary) of the will, as they may be viewed as more independent. It is also usually possible for a lay executor to hire professional help if and when they need it, rather than selecting a professional executor at outset.

Who do you want to benefit from your will?

This is naturally the most important question when drafting your will. As well as knowing who you want to receive the bulk of your estate, such as your spouse or children, you may also want to consider smaller gifts, such as sentimental or valuable items you want certain beneficiaries to receive.

You should also consider the timing of these gifts, particularly regarding the financial security of your spouse in the event of your death e.g. you may wish your children to ultimately receive an asset but wish your surviving spouse to benefit from it during their lifetime. Timing can also be an important consideration where gifts to minors are being made – you may wish assets to be held on trusts until they are an adult.

How do you want your beneficiaries to benefit?

This is by far the largest and most complex issue which needs to be considered in drafting a will. In the sections below we go through a number of ways in which your estate can be left to your beneficiaries, considering the various applications of each method.

Specific Legacies

This is the gift of a specified asset to a specific person e.g. you could have an old grandfather clock which you wanted a sibling to receive. This type of gift is best reserved for valuable assets that can be clearly described and that are unlikely to be sold or degrade. This is because legacies can cause problems for executors where there is uncertainty over an asset or that asset has changed. If you have jointly owned assets which you wish to be gifted on second death, the clause must be included in both wills.

Chattels & Memorandum of Wishes

On first death of a married couple, the deceased's chattels may be best left to the surviving spouse absolutely with an "understanding" that they are subsequently gifted in line with the deceased's wishes. Experience has shown that it can be problematic for executors and trustees to be responsible for chattels - for example being responsible for storage and security.

Alternatively, this could be dealt with through a detailed 'Memorandum of Wishes' setting out who you would like to receive certain personal effects. This is generally preferable to a long list of specific legacies in the will itself, which can be difficult for executors to administer. A memorandum is not legally binding – it is effectively a request to your executors. This gives the executors, usually spouse in the first instance, the flexibility to deal with changing assets and beneficiaries.

Pecuniary/Monetary Legacy

These are absolute gifts of specific amounts e.g. £10,000 to each of my grandchildren. It is also possible to specify the gift of a specific account, such as an investment account, ISA etc. These types of monetary legacy are generally inadvisable as accounts can change, for example if you specify account no. 11112222 but subsequently transfer to a new account, no. 33334444 this gift would fail.

These gifts are generally suitable for smaller amounts. It is not generally advisable to leave a large proportion of your estate through this method as values can change over time (which could cause unintended consequences down the line).

Residue of the Estate – Absolute Gifts

Your estate after the payment of debts, expenses and legacies is referred to as the 'residue'. The most common way of leaving funds to beneficiaries is by making an absolute gift of a proportion of the estate's residue e.g. '100% of my residual estate to my spouse'. Clauses will need to be included for the event of the beneficiary predeceasing i.e. with the previous example; 50% to each of their children should their spouse not survive them.

With absolute gifts it is important to ensure there will always be a beneficiary to receive your estate. Many people set up a prescribed order for people to receive assets e.g. spouse in first instance, if not then children, then their remoter issue (grandchildren etc) before moving out to wider family members. It can be useful to have a 'Reserve Beneficiary' such as a charity to receive the funds in the event that all previous listed gifts fail, in order to prevent the will from failing and the assets passing to the State.

The main advantage of absolute gifts is that they are simple way of setting out and drafting your wishes. They are also usually simpler for your executors to then administer.

There are however a few potential disadvantages of absolute gifts which need to be considered. Firstly, there is little flexibility after the will has been drafted. If you wish to vary who benefits or in which order this generally requires a new will to be drafted. Secondly, as your assets will be owned outright by the beneficiary, they will be exposed to a number of potential threats such as from divorce and creditors. This could potentially apply to a surviving spouse; in the event they remarried their assets could pass to their new spouse on their death, running the risk of disinheriting your children. It could also potentially apply to assets passing to your children e.g. being lost in a future divorce settlement or to creditors in the event of a failed business venture. By not gifting asset absolutely there is some potential scope to reduce these risks.

Another potential disadvantage of gifting assets absolutely is that of multiple charges to Inheritance Tax (IHT). If your children accrue significant estates of their own, assets passing absolutely from your estate would likely create or exacerbate their own IHT liability. Assets passing to the next generation would then incur IHT for a second time and this process could repeat through generations.

The alternative to leaving assets absolutely to your beneficiaries is to leave them on trust, which we consider below.

Residue of the Estate - trusts

A trust is a legal contract between a 'settlor(s)', who gives away rights to certain assets, and a 'trustee(s)' who is charged with looking after these assets. The trust will specify 'beneficiaries' who

are to benefit from these assets. The trustees will legally own and manage the assets for the ultimate benefit of the beneficiaries.

It is possible to leave assets on trust, absolutely for the benefit of specific beneficiaries, however these trusts have little advantage in overcoming the issues highlighted with absolute gifting. We will instead focus on trusts which have 'discretionary' powers. Under these trusts the distribution of asset lies at the discretion of the trustees, whereby the beneficiaries each have a potential interest in the trust.

The main advantage of this type of trust stems from the fact that it is a separate legal entity to the beneficiaries. The trust owns the asset, rather than a beneficiary, who has no defined or quantifiable interest. As beneficiaries do not own the assets they can be protected from creditor or divorce courts, although this is not guaranteed (judges have previously treated portions of trusts as belonging to beneficiaries). Generally, the wider the range of potential beneficiaries, the greater the scope for protection. It is common for classes of beneficiaries to be used in these trusts, rather than named individuals e.g. all my children and their remoter issue.

As the trust owns the assets, the problem of inter-generational IHT can be reduced. One generation (i.e. your children) can be loaned the assets, which can be interest free and for their whole lives, rather than gifted them. On their death, provided there are available assets, the loan is repaid from their estate, rather than forming part of it and being subject to IHT. The assets can then be lent to the next generation. These trusts are subject to periodic IHT charges every 10 years; however, this is only levied on returns on assets and has a maximum rate of 6% of the Trust's assets and is often substantially lower.

There are disadvantages of trusts to be considered. They are more complex, both at outset and particularly in terms of ongoing administration for the trustees. They can be a little more costly to set up, but more importantly where your trustees require ongoing professional assistance there will be ongoing costs. As the trustees will have discretion over the distribution of assets this is obviously a very important role and they will need to be people you can trust to carry out your wishes.

Where discretionary trusts are used it is always advisable to complete an 'expression of wishes' – a letter to the trustees setting out how you wish the funds to be used. This is not a legally binding document that the trustees must follow, however most trustees will tend to do so. Such an expression would be valuable in the event of a disagreement between trustees.

Who would you want to be trustees of your trust?

This is in some ways similar to the question over your executors and indeed the two roles are often performed by the same people. However as described above, where 'discretionary' trusts are used, this role is of far more significance to that of an executor. As with executors it is usual for married couples to nominate their spouse as a trustee. Further trustees will be needed for after the death of the spouse.

Again, as per the role of executor, the most common solution is for either or both of your children/family members and a professional trustee to be selected. With discretionary powers there is the potential for friction and disagreements between family members in distributing funds – clear conflicts of interest will exist. The downside of professional trustee is once more the additional costs involved. The advantage is that they will be completely impartial and for their own protection (to avoid being successfully sued by beneficiaries) will tend to accurately follow an expression of wishes. Professional trustee fees are nearly always at an hourly rate, so are more cost effective for larger trusts.

Inheritance Tax (IHT)

It is worth noting at this point that gifts to a spouse are exempt from IHT (either lifetime gifts or in the will), whereas gifts to others in your will are subject to IHT at 40%, if you exceed the IHT nil rate band (currently £325,000).

It is possible to leave assets through a trust with discretionary powers, whilst avoiding a charge to IHT on first death. If a surviving spouse is given a life interest to the trust through an 'immediate post death interest in possession' it will be treated as being made to the spouse for IHT. The trust will form part of spouse's estate and the spousal exemption will apply.

Upon the death of the surviving spouse, any value of the estate over the survivor's own nil rate band (which will be increased by any unused nil rate band from the first spouse) will likely be subject to IHT at 40%.

Using trusts in your will rather than absolute gifts will not help you to reduce your estate's IHT liability (they may help reduce IHT on the next generation as discussed). For the majority of people, the most effective way of reducing an IHT liability is through lifetime gifting, either in the short term or between 1st and 2nd death. This can either be via absolute gifts or through further trusts. Lifetime gifts are a subject in their own right and outside the scope of this guide.

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