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WILLS

General

The Laws of Wills inheritance and Probate is broadly similar in the England and Wales to that in Ireland. The major differences relate to the rights of wife's and children where Wills are made and their rights where no Will is made up (intestacy).

It is not absolutely necessary for an Irish person who owns a UK property to have a separate English Will. Generally the Irish Will is recognised and can be resealed by the England and Wales probate office. However, it will often be advisable and useful for an Irish person to make a separate English Will from both efficiency and speed of administration of assets and also from the perspective of UK inheritance tax planning.

The rules in relation to the validity of Wills in England and Wales based on the same legislation as the Irish legislation. The Will must be in writing, signed at the end by the person making it and they must sign the presence of two witness who themselves sign their name. English law will recognise a Will as valid if it accords with the law of the place where it was executed or the Country where the deceased was resident or national at his time of signing or at death

A will must be in writing and must be signed by the person making it in the presence of two witnesses. The person making the will must be of sound mind and able to understand the significance of what he is doing.

The will takes effect from the date of death. It is interpreted in the context of the circumstances that apply on that date. If, for example, certain items of property no longer exist, the gift will simply be of no effect. If the beneficiary dies before the deceased, the gift will generally lapse. This means it will simply have no effect and will pass into the clause which deals with the residue of the assets (those not specifically disposed of).

Executors and Trustees

Executors are the persons who administer the deceased's assets. This means that they put into effect the terms and conditions of the will. There should be at least one executor, but there can be any number. An executor need not act. The choice of executor will depend on circumstances. Often a family member or close friend would be appropriate, particularly if they are familiar with the deceased's affairs. They are unlikely to want to charge for their time. If the estate is not straightforward the individuals may lack experience and may employ a solicitor or tax specialist.

Trustees may also be appointed under a will, if the will creates a trust. In contrast to executors, the trustee's role is more long term. The trustees put the terms and conditions of the trust created in the will, into effect. This will typically arise for minor beneficiaries or where it is intended to grant an interest to say a spouse for life and remaining interest to children after the life of the spouse.

Typically a will may make a number of specific gifts of assets, money or properties. If specific assets are given and are no longer owned by the deceased at death then the gift falls away and has no effect. In contrast general gifts of, say, money or a generic asset would not fall away. Such assets will have to be purchased, if they are not held by the estate.

Outright Gifts

A gift of the "residue" is a gift of all remaining assets that have not been specifically transferred under earlier clauses in the Will. This is necessary in order that the will fully disposes of the deceased's assets.

There is a distinction between a "vested" and "contingent" gift or benefit under a will. A vested gift imposes no conditions and the named beneficiary becomes entitled to it immediately. A contingent gift is one subject to a condition which does not take effect until the condition is met. An example may be a gift of a sum of money to a grandchild subject to his reaching the age of 25 years. If the grandchild dies before that age, neither he nor his successors will be entitled to the gift.

If a beneficiary predeceases the person making the will, the benefit would normally fall away. There is an exception if the testator's child or remoter descendant dies before the deceased leaving issue living. In this instance, these children would take the gift in the place of the deceased parent.

If assets are given outright, then they will simply be transferred directly to the beneficiary. If, however they are given to minors or there is some contingency that a person lives until a certain age, it is usual to gift assets on trust until the age is reached or the contingency is satisfied.

Administrative Powers

Wills should contain administrative powers, setting out what executors can do. The law provides certain default options but it is usually desirable to amend or adapt these. It is desirable to include certain administrative powers that do not automatically arise at law.

The power at law to insure assets is limited and inadequate and it usual to provide specific power. There are no implied powers of trade so where there are business assets, it is desirable to allow the possibility that the personal representative could trade. In the absence of this power, a business would have to be sold in order to administer the estate.

It is desirable for personal representatives to have power to appoint and retain agents. Certain functions cannot be delegated but in the case of general functions such as asset management, it may be desirable to delegate certain functions.

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Gifts in Trust

Simple wills may give assets directly to beneficiaries. However, because of the uncertainty about the future financial or personal position of the beneficiaries, many wills set up trusts which introduces flexibility as to who will benefit and when. A significant advantage is that the trustees will be able to see the assets actually available in the context of the beneficiaries' needs and requirements.

In order to create a trust (e.g. in a will) there must be a definite obligation on the person concerned to apply the asset for the purposes of the trust. If assets are left on the basis of a wish that such and such is done with them, this will not impose a trust.

A discretionary trust whether created in lifetime or in a will provides flexibility. It allows the trustees to take account of circumstances prevailing at the date of death and later dates and to use the trust property as best suits. The trust assets could consist of a particular sum of money, property or could consist of the remainder of assets after payment of specific benefits.

Cancellation of a Will

A Will is generally revoked by a later Will or by later marriage or civil partnership, divorce or nullity. It can also be revoked by a deliberate act of destruction of the will itself. Marriage will generally revoke a prior Will, unless it is made in contemplation of marriage. Civil partnerships have been introduced in the United Kingdom. A Civil partnership will revoke an existing Will in the same way as marriage does.

Divorce and nullity does not absolutely revoke or cancel in the Will, as in the case with marriage. Provisions in the Will by which former spouse is appointed as executor has effect as if the former spouse died upon the date on which the marriage was dissolved. Any property given by Will to the former spouse passes as if that former spouse had died and therefore does not pass. Likewise an appointment of a former spouse as guardian of children is revoked. None of this applies to separations; only to divorce or nullity. Similar provisions apply in relation to the termination of a civil partnership.

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This Guide is intended as an overview and broad outline of the matters covered in it. Its purpose is to inform and raise awareness. We are happy to offer specific legal advice on particular circumstances.

This Guide should not be relied on as a substitute for comprehensive legal advice with reference to the particular circumstances.

While we have taken due care in the preparation of this publication, we do not accept legal liability as a result of any reliance placed on anything in this Guide. The reader should rely only on specific legal or taxation advice.

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