

Making a Will

January 2011 Edition



WHAT HAPPENS IF I DIE WITHOUT MAKING ANY WILL?

If you die without making a Will, the law provides that your spouse or civil partner is entitled to your entire estate if there are no children. If you leave a spouse or civil partner and children your spouse or civil partner gets two-thirds and one-third goes to your children. If you do not have a spouse or civil partner, your entire estate goes to your children. In either event, if there are children under the age of 18 years, trustees must be appointed. If a child of yours dies before you leaving children, those children take their parent's share. If you do not have a spouse, a civil partner or children, your parents are entitled to your entire estate. If both parents are deceased, then your estate is divided between your brothers and sisters (if any brother or sister dies before you and leaves children, then those children (your nieces and nephews) take their parent's share).

WHERE DO I START?

Record the basic information (see sample questionnaire attached to this leaflet):

• **YOUR ASSETS, THEIR VALUE AND WHERE THEY ARE LOCATED**

It is important that after your death your Executors will be able to find details of all your assets and know where to find bank accounts, shares/savings certificates, deeds, life insurance policies and all relevant financial information. If you are in receipt of social welfare or nursing home supplements from the State, e.g. under the 'Fair Deal Scheme', you should ensure the details of the type of benefit you have received will be available to your executors. You should also have all these details available when making your Will for your solicitor to advise you fully on legal or taxation implications that could arise from the holding of these assets.

• **NEAREST RELATIVES**

Set out particulars of your immediate family, i.e. the names of your spouse or civil partner, children or other dependants (including their dates of birth) or otherwise your closest living relatives and their addresses.

• **EXECUTORS**

Choose the person/s best suited to carrying into effect the terms of your Will. An advantage of making a Will is that you get to choose the person/s best suited. A minimum of two executors is recommended and, if you are a senior citizen, at least one of those should be younger than you.

• **PROPOSED DIVISION OF YOUR ESTATE**

The usual format is:

Cash legacies (e.g. to relatives, friends, charities).

Bequests of specific property (e.g. jewellery, furniture, etc.).

Any other special provisions (see “special circumstances”).

Residuary bequest (which may comprise most of your estate).

• **RESTRICTIONS (WHERE A WILL IS MADE)**

The law imposes certain restrictions on how you may deal with your estate. Your spouse or civil partner has a legal right to half of your estate where you have no children. If you have children, your spouse or civil partner is entitled to one-third of your estate. However, the one-third share which your civil partner is entitled to can be subject to a possible claim by one of your children. Your children are not automatically entitled to any part of your estate but they may apply to court if you fail in your moral duty to make proper provision for them in accordance with your means, taking into account their position in life. Your spouse or civil partner also has a right to require that the family home and household contents be included in his/her share (and the share of children under the age of 18).

• **SPECIAL CIRCUMSTANCES / ASSETS**

Special considerations arise if:

- Any of the beneficiaries are under 18 years of age (see “What if I have young children?”).
- Any of the beneficiaries suffer from a disability (see “Discretionary Trust”).
- A farm, business or your dwelling house is a significant asset (see “No cash assets” and “Discretionary Trust”).
- You have availed of the Fair Deal Scheme under the Nursing Home Support Scheme Act 2009.

- You have recently cohabited with someone

• **FUNERAL WISHES**

You should inform your family in your lifetime as to what your funeral wishes are, as your Will may not be read until after the funeral.

WHAT IF I HAVE YOUNG CHILDREN?

If you have children under 18 years of age, your Will should give directions for the care of those children and how they are to be provided for. Unmarried couples additionally should ensure that each of their Wills clearly states who is to have custody and guardianship of their children if one of them dies. Most importantly, both married and unmarried couples should ensure that their Wills clearly state who is to have custody and guardianship if both spouses/partners die.

• **GUARDIANS**

A Guardian is the person you select to take over your role as parent in rearing your children under 18 years of age.

• **TRUSTEES**

You can appoint a trustee to look after the assets in your estate; an executor can also be a trustee. Your Will should give your trustees 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 years or who have a mental disability.

• **PROVISION FOR CHILDREN**

You may wish your estate to be divided equally between your children when they reach a specified age. You can arrange for them to receive an income from the estate, possibly from 18 years of age; alternatively, you may set up a 'discretionary trust' for your children until the youngest reaches a certain age e.g. age 21 (see "What is a Discretionary Trust?"). Alternatively, if the children are likely to stay with a relative, consider enabling your executor/ trustee to advance money to the new household budget, including allowing for monies for increased mortgage payments on a larger home to accommodate both families.

WHAT IF I'M SEPARATED, DIVORCED OR AN UNMARRIED PARTNER?

Being separated or divorced from your spouse does not mean that your spouse automatically loses the legal right to a share of your estate; however, the rights may be cancelled under the terms of a separation agreement or judicial separation or can be

cancelled by court order when there is a divorce. These provisions also apply to civil partners under legislation which was commenced in January 2011.

In the case of divorce, a former spouse who claims that proper provision has not been made for him/her may apply to court for a share of the deceased's estate within 6 months from the date of grant of probate or grant of administration. Personal representatives are required to make reasonable attempts to notify the former spouse. A share will not be given to a former spouse who has remarried. The same rules apply to a separated spouse. These provisions also apply to civil partners under legislation which was commenced in January 2011.

In the case of unmarried partners, the "partner" will have no succession rights and will therefore be limited to whatever rights he/she may establish in contract (e.g. where he/she has financially contributed to the purchase of a property) or whatever you have left for him/her under your Will. In addition, a surviving cohabitant has the right to apply to court for provision from the deceased cohabitant's estate now that the relevant legislation has come into force.

WHAT IF I HAVE NO CASH ASSETS?

If your only asset is a house, business or farm and you do not have sufficient cash, you can leave the house to a particular beneficiary on condition that the beneficiary arranges for legacies to be paid to other beneficiaries. In the case of an elderly relative, you could consider leaving the house, business or farm to them for their lifetime and state in your Will what you want done with the property after their death.

WHAT IS THE SIGNIFICANCE OF JOINT PROPERTY?

Property held jointly (rather than in separate shares) passes on to the survivor where there is clear evidence that this is intended. However, there are legal rules which may prevent this.

With bank accounts, it is not unusual to open a joint bank account for convenience (e.g. where the original account holder is elderly or immobile to enable a relative to pay bills) or for a specific purpose (e.g. to pay for the funeral). It is therefore important when opening such accounts to specify in writing whether it is intended that the survivor is to keep the money or whether you wish the balance in the account to form part of your estate and pass under the terms of your Will. You should take specific steps to ensure that your intention is perfectly clear as to what is to happen to the bank account on your death.

WHAT IS A DISCRETIONARY TRUST?

This provides your trustees with full power to apply capital and income at their discretion for the benefit of your beneficiaries. This may mean that some beneficiaries will receive more than others - that is up to the trustees to decide. A discretionary trust can be useful where beneficiaries are young, suffer from a disability, are elderly, for a dependant relative and for tax planning purposes for larger estates.

CAPITAL ACQUISITIONS TAX

Capital Acquisitions Tax (CAT) is a tax on gifts and inheritances. Inheritance tax may have to be paid on an inheritance inherited on the death of any person (e.g. under a Will or on intestacy). Gifts and inheritances between spouses are exempt. It is also expected that there will be special tax provision for civil partners once relevant legislation on this area comes into force, likely in 2011

TAX FREE THRESHOLD

A gift or inheritance from a spouse is not liable to inheritance tax. This will only apply to a legal spouse and to divorced persons in certain circumstances. A "cohabitant" or "partner" in the general meaning (i.e. not a "civil partner") is treated as a stranger for tax purposes.

If you leave property by Will to someone other than a spouse then the first portion, known as the tax free threshold, is taken free of tax. The amount of the tax free threshold depends on your relationship to the beneficiary and will also depend on whether any other benefits have been received.

For instance where you leave property to a child, or a minor child of a deceased child or, in certain circumstances, to a foster child or to a parent (in an unrestricted form) then the tax free threshold is the largest; known as the Group A threshold. If the property is left to a parent (where it is a restricted interest), brother or sister, niece or nephew, or grandchild, then Group B threshold applies, and if property is left to anyone else (for example a friend, in law, cousin or "partner") then Group C threshold applies. The tax free thresholds are updated annually, usually in January in line with inflation. Details of the threshold amounts for the current year can be found [here](#).

However, if a person has received other gifts or inheritances since 5 December 1991 they are added together (aggregated) according to certain rules relating to the date on which the gifts were received and from whom they were received. The effect of this may be to reduce or remove the tax free threshold available. If aggregation does apply, then the tax bite may prove disproportionate and professional advice should be sought.

WHAT HAPPENS AFTER THE TAX FREE THRESHOLD IS USED UP?

Inheritance tax is paid on the balance of the inheritance at the rate that applies on death, Details of the current year rates can be found [here](#)

VALUATION DATE

The date for payment of inheritance tax (the valuation date) depends on the circumstances of each case. The valuation date determines the value of the assets subject to tax, the timing for the payment of the tax and the timing for the filing of the tax return. Where the valuation date is between 1 January and 31 August, the pay and

file date is on or before 31 October in that year. Where the valuation date is between 1 September and 31 December, the pay and file date is on or before the 31 October in the following year. Interest on overdue tax is payable at a rate of 0.0219% per day. A surcharge is payable on the late filing of a return and penalties and/or publication on default could apply.

HOW CAN THE IMPACT OF INHERITANCE TAX BE REDUCED?

You may wish to plan the passing of your assets so as to minimise the tax that your beneficiaries have to pay. If so,

Step 1 Look at the reliefs and exemptions available.

Step 2 Look at dividing up your property to use all available tax free thresholds.

Step 3 Look at how best your beneficiary can fund the tax.

WHAT EXEMPTIONS OR RELIEFS ARE AVAILABLE?

1. AGRICULTURAL PROPERTY

To qualify for agricultural relief, 80% of the beneficiary's property (after a gift/inheritance) must consist of agricultural assets as defined. The value of the agricultural property he/she receives may then be discounted when making the CAT return provided other conditions are met.

2. BUSINESS PROPERTY

If business property, which would generally include assets such as a business or shares in a family company, is inherited, then the beneficiary may be entitled to claim business relief so that the value of the business property inherited is reduced when calculating the inheritance tax (if any) subject to other conditions.

3. FAVOURITE NEPHEWS/NIECES

If the beneficiary is a nephew or niece who worked full-time in the business/on the farm with you for five years, and you leave the business/farm to him/her, then he/she may be entitled to the same tax-free threshold as a son or daughter in relation to that property.

4. DWELLING EXEMPTION

If you leave a house or apartment to a beneficiary who has continuously occupied it as his/her main residence for a period of three years immediately before the date of your death and he/she continues to occupy it for a period of six years after the date of your death, then such a beneficiary may be exempt from tax on his/her inheritance of the house provided all the conditions for exemption are complied with.

5. MINOR CHILD OF DECEASED CHILD

If you leave property to a grandchild who is the child of a child of yours who has predeceased you, and that grandchild is under the age of 18, then that grandchild will be entitled to the same tax free threshold as a child.

6. SURVIVING SPOUSE RELIEF

If property is left to the spouse of a deceased member of your family, that spouse will be entitled to the tax free threshold amount that the deceased family member would have been entitled to in relation to that inheritance.

7. CHARITABLE BEQUESTS

Bequests made to charities may be exempt from tax.

8. OTHER EXEMPTIONS

In some circumstances certain other types of property may be exempt from CAT provided certain conditions are met.

NB: Each exemption and relief has conditions that must be met and these are subject to change under annual Finance legislation. Professional advice should be obtained when considering whether a particular exemption or relief is applicable.

OPTION OF GIVING A GIFT (other than by will)

If a gift is given then a small gift exemption can be claimed. The current Small Gift Exemption is €3,000 from any one person in any one calendar year. Provided you retain sufficient assets to ensure your and your dependants' wellbeing for your lifetimes, making a gift of property which is likely to increase in value would be a sensible tax planning opportunity. NB: Gifting property may trigger a liability to Capital Gains Tax or Stamp Duty and professional advice should be sought. A gift of assets may be taken into account if later the donor avails of ancillary State support under the Fair Deal Scheme.

DIVIDING UP PROPERTY

If you divide your property among the family of the person you wish to benefit, the tax free thresholds available are multiplied accordingly. For example, if, instead of leaving assets only to your daughter, you should consider leaving amounts to your daughter, son-in-law and three grandchildren. Each person may have available to them an individual tax-free threshold amount, without triggering a tax liability.

PLANNING FOR THE PAYMENT OF TAX

If inheritance tax is going to arise on your estate then you might consider taking out an insurance policy (called a section 72 or 73 policy) the proceeds of which are exempt from inheritance tax if used to pay inheritance tax.

DISCRETIONARY TRUST

A discretionary trust can be useful where the person making the Will wants to benefit a wide group of people (for instance to include grandchildren, persons not yet born and future spouses) and would like to provide for some flexibility as to who should benefit or the amount they should be given.

Discretionary trusts are liable to a once off tax of 6% on the death of the person creating the trust, once his/her spouse, and all their children are over the age of 21. There will be a refund of 3% if the trust is distributed fully within 5 years. There is a further payment of 1% calculated on 31 December in each succeeding year following 12 months after the payment of 6% is made (i.e. the first year).

Disclaimer: The information in this brochure is intended as a general guide only and detailed advice should be obtained. No responsibility is accepted for errors or omissions howsoever arising.

NOTES

INSTRUCTIONS FOR MY WILL

(This should be completed to give an overview of the value of your estate and your wishes. Precise details of each asset are not required.)

PERSONAL DETAILS

Full Name

Address

.....

Occupation

Date of Birth

PPS Number

Instructions in relation to burial (note this should be communicated to your family as your Will may not be read until after your funeral).....

.....

EXECUTORS AND TRUSTEES

Name 1

Address

Name 2.....

Address

Name 3.....

Address

FAMILY AND DEPENDANTS

Spouse/Civil Partner

Children:	Name	Age	Under 18 Yes/No
-----------	------	-----	-----------------

.....

.....

.....

.....

Other dependants, e.g. co-habiting partner, aged parent or handicapped relation:

Guardians of infant children

.....

DETAILS OF ASSETS

House	Value: €.....
Contents (insurance value)	Value: €.....
Bank/Building Society accounts	Value: €.....
An Post	Value: €.....
Business	Value: €
Pensions	Value: €.....
Life Insurance Policies	Value: €.....
Other Property (e.g. stocks or shares)	Value: €.....

Specify any assets (including house) that you hold jointly

Specify where assets are subject to debts that are not covered by mortgage protection policies

Location of title deeds or share certificates

SPECIFIC DEVICES OR BEQUESTS

Beneficiary

Beneficiary

PECUNIARY (CASH) LEGACIES

Beneficiary

Beneficiary

RESIDUE OF ESTATE

Beneficiary Value:

Property

Property

Name of Stockbroker

Name of Accountant:

Which of your beneficiaries have received or are likely to receive other benefits?:



Law Society of Ireland

Blackhall Place, Dublin 7, tel 01 672 4800, fax 01 672 4801 DX: 79 Dublin E-mail:
lawsociety@lawsociety.ie Website: www.lawsociety.ie