

## The Oval *Slant* — January 2010

### Where there's a Will there's a way

Benjamin Franklin said “there are only two certainties in life – death and taxes”. It's not really possible to do much about the former – as actuaries would say, that is a 100% statistic! And, whilst Winston Churchill may have said ‘there is no such thing as a good tax’, we may all sometimes think Mark Twain is right when he said ‘the only difference between the taxman and a taxidermist is that the latter leaves the skin!’ Apparently, January is the month with the highest mortality rate – perhaps over-indulgence at Christmas and too much time spent with the family may have some relevance here! So, perhaps now is a good time to be reviewing and updating our Wills; after all we never know when the Grim Reaper might make a visit.

### Intestacy

There are still too many people who don't bother to make a Will at all. This may be because they don't think they have enough wealth to worry about, or they cannot decide who to leave it to or, all too often, they are under the misapprehension that all their Estate will go to their spouse anyway. There are clear rules as to what will happen to an Estate in the absence of a valid Will. Intestacy rules differ for Scotland but, briefly, for England and Wales a spouse or civil partner (with children) gets the first £250,000; plus a half interest in the remainder. Any children inherit half the excess over £250,000 and the remainder when the spouse/civil partner dies. If there are no children, the spouse/civil partner receive the first £450,000, with the remainder going to parents if still alive or to surviving brothers and sisters. The list goes on to remoter family but, ultimately, if there are no living close relatives, the whole Estate goes to the Crown.



### A basic Will

It is always possible to prepare your own Will or use a standard form such as available from WHSmith. However, this is fraught with danger and is a false economy. Over the years, there have been many instances of incorrectly drafted Wills which are either rendered invalid or simply do not achieve the intended aims of the deceased. There have also been numerous family disputes over who should get what; particularly when a Will is not clear on the matter. By the way, if you are asked to be a witness to a Will – don't hold your breath! Either it means you are not a beneficiary at all or, even if you are, the bequest becomes invalid for a witness.

It therefore seems sensible to use a solicitor; even if only a straightforward and simple Will is required. Using a solicitor should ensure the Will is correctly drafted, signed, dated and witnessed. It should also ensure clear and accepted legal wording is used. It also minimises the likelihood of invalid or unrealistic bequests being included e.g. bequests adding up to more than 100% (it happens!). It also reduces the possibility of any ‘undue influence’ such as where a strong family member or carer may unfairly promote their own interest. It also means there is a secure place where the Will is stored and, finally, there is someone to sue if things go wrong! Solicitors have a standard template to use and so a Will does not need to be complicated and should not cost that much to prepare.

### Reviewing Wills

We generally suggest to clients they look at their Wills every 5 years or so. This is to ensure that the terms of the Will still accurately reflect their wishes. For example, have beneficiaries already died, have there been further children/grandchildren to consider; does a family beneficiary need to be removed due to a dispute, etc. This action is also sensible to ensure you still have a suitable Executor and probably a nominated ‘reserve’ for this capacity. Executors can often pre-decease the client; which can lead to considerable problems. Do be aware also that a marriage or civil partnership invalidates an existing Will; unless it is drafted in anticipation and is worded to that effect. Finally, changes to general taxation and inheritance tax (IHT) in particular, can affect the efficiency of a Will.

## Transferrable IHT allowances

Since late 2007, it has been possible to transfer the unused IHT allowance when the first spouse or civil partner dies and to make this available to the survivor. Currently, the IHT allowance is £325,000 and so, if no use has been made of this at the first death, £650,000 should then be available to the survivor's Estate. If part of this allowance is in fact used then the remainder is available pro-rata to the survivor. This seems to be a generous concession as there is no time limit (for example a WW2 widow could still benefit; even though death occurred over 60 years ago). Before 2007, the first IHT allowance would otherwise have been entirely wasted if the Estate was gifted to the surviving spouse and such gifting is unlimited due to the inter-spouse exemption.

Whilst this is indeed helpful for many Estates, it does lead people into a false sense of security. Many think that just having a 'normal' Will (ie all to the surviving spouse and then to the children) is satisfactory. In many cases it will be, but this is often only a partial solution. Whilst there are now indeed combined IHT allowances available, IHT only applies when you die and not when you actually make your Will. Hence, it is not sensible to rely on both allowances remaining available and there are other sound reasons for addressing this in your Will anyway.

## Discretionary Will Trust

A Will can be drafted to gift everything to the surviving spouse/civil partner apart from the available zero rate IHT band. This is gifted into a Discretionary Trust which has the surviving spouse as both a potential beneficiary and a Trustee. There needs to be at least one other 'friendly' Trustee who understands any requirements of the surviving spouse and a Letter of Wishes from the deceased can reinforce this. Hence, the surviving spouse/civil partner can still confidently have access to the Trust funds, without them forming part of his or her Estate. Whilst at face value this only achieves the same result as the above Transferrable IHT allowance, there are other considerable benefits including:-



- The assets within the Trust may grow at a faster rate than any increase in the IHT allowance; thereby reducing the ultimate IHT liability. This is because any growth occurring within the Trust is immediately IHT free.
- Any payments to the surviving spouse can be made by the Trust in the form of loans. At the second death such loans are a liability and can be deducted from the Estate before calculating the IHT liability.
- Protection of the Trust assets from any 'gold digger' of not only the surviving spouse but also other family members who may be included as beneficiaries. Protection of the Trust assets from calculating entitlement to long term care and other benefits – they simply do not belong to the surviving spouse and neither do they have any absolute right to them.

## Sound financial planning

As can be seen from this brief summary, there are considerable potential benefits in having a correctly drafted Will in place that is periodically reviewed. Not only are there considerable IHT advantages, but it can make life a lot easier for those dealing with the Estate and also avoids unnecessary family disputes. It makes sense to take suitable professional legal advice and is generally money very well spent. Although there is no need to over complicate matters, a Will can accommodate unusual bequests or requirements and provide considerable peace of mind to all concerned. Most importantly, a correctly drafted Will ensures the deceased's wishes are complied with and that the right assets go to the right people.

Perhaps we should take a leaf out of the book of the World's most famous economist – John Maynard-Keynes. 'The avoidance of taxes is the only intellectual pursuit that carries any reward'. At least with a properly drafted Will, the payment of unnecessary death taxes can be avoided!

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