WILLS FAQ'S

WHAT HAPPENS IF PROPERTY IS JOINTLY OWNED?

1. Joint tenancy

If a property is owned by two or more people as joint tenants and one of the joint tenants passes away then the share in the property of the deceased person owns passes automatically to the other owner(s). This is what we call the **right of survivorship**.

A very common example of this is the **family home** shared by a married couple. If the property is in the joint names of the couple and they own it as joint tenants, if either of them pass away the surviving spouse becomes full owner.

It is advisable for couples to check that the family home is in joint names. One of the common occurrences we see is the house being registered in the name of the husband – this was once a common practice and if the husband dies without making a will (intestate) the family would be entitled to shares in the property:

- Surviving wife: 2/3 share in the property.
- Children: 1/3 and if there is more than one child they divide that one third between them. So you can imagine the complications that can arise.

2. Tenancy in common

If two or more people own a property as tenants in common you don't have a right of survivorship. If a person passes away and they own a share in a property as a tenant in common the other owner or owners do not inherit the share that the deceased owned.

It will be inherited by his nearest next of kin if he died intestate and if there is a will the share in the property will pass to whatever beneficiaries are named in the will.

Another scenario is if there is a co–ownership agreement the surviving co-owners may have an option to buy the property from the executors.

If people have bought property as tenants in common they should make sure that they have a co-ownership agreement which will regulate what happens if one or more of the co-owners die.

IF A PERSON IS MAKING A WILL AND THEY ARE LEAVING THEIR HOUSE TO SOMEBODY, DO THE CONTENTS OF THE HOUSE AUTOMATICALLY GO WITH IT?

Usually the Testator, which is the legal term for the person making the will, will specify if the contents are to be inherited with the house. It is a personal choice, some people will want to leave the house and contents to the same person and others will specify that the contents or personal effects are to go to someone else or be divided between family members.

WHAT HAPPENS IF A PERSON MAKES A WILL LEAVING THEIR HOUSE TO SOMEBODY AND THEY SUBSEQUENTLY SELL THAT HOUSE?

When a person makes a will they are not prevented from dealing with their assets, of a house, money or shares. So if a person makes a will leaving their house to somebody and they sell that house before they die this bequest is said to lapse the person named in the will does not get anything.

WHAT HAPPENS IF SOMEONE DIES WITHOUT A WILL OR IF A WILL IS BADLY MADE?

- A person who dies without a will is said to have died 'intestate'.
- If someone dies intestate, it means the person's estate, or everything that they own, is distributed in accordance with the law by an administrator.
- In these cases, debts and expenses are firstly deducted, then the estate is distributed as follows if you are survived by:

- A spouse but no children (or grandchildren): your spouse gets the entire estate.

- A spouse and children: your spouse gets two-thirds of your estate and the remaining one-third is divided equally among your children. If one of your children has died, that share goes to his/her children.

- Children, but no spouse: your estate is divided equally among your children (or their children).

- Parents, but no spouse or children: your estate is divided equally between your parents or given entirely to one parent if only one survives.

- Brothers and sisters only: your estate is shared equally among them, with the children of a deceased brother or sister taking his/her share.

- Nieces and nephews only: your estate is divided equally among those surviving.

- Other relatives only: your estate is divided equally between the nearest equal relationship.

- In the absence of a will and of any relatives the estate goes to the state – but this is a very rare occurrence.

CAN WILLS BE CHANGED OR UPDATED?

- A will can be changed and updated as often as often as you like. A person can make a will today and change it tomorrow and everyday thereafter. It is important to review the will regularly.

- A will can be revoked in its entirety and an entirely new will prepared
- Specific parts of the will can be altered by making what is called a **codicil** – which is an amendment to the will without altering or reviewing the entire will.

- It is recommended that people review their wills regularly as their circumstances may change.

- If the author of a will (the Testator) is married and excludes their spouse from the will the spouse is entitled to a **'legal right share'**. That means that **a spouse cannot be dis-inherited.**

- A spouse who has been excluded from a will is entitled to half the estate if there are no children. This share takes priority over all other provisions.

- A spouse who has been excluded from a will is entitled to one-third of the estate if there are children. This share takes priority over all other provisions.

- Children however, who have been excluded from a will do not have the same entitlements – their circumstances dictate their entitlements.

  There are a number of other situations where wills can be challenged such as:

  - Lack of capacity
  - Under influence
  - Lack of formability

WHAT IS ESTATE AND SUCCESSION PLANNING?

Estate planning is planning the transfer of assets to the next generation in a tax efficient way.

While making a Will is certainly the first step in planning ahead there are other issues to consider depending on your own particular circumstances. In certain circumstances it might be appropriate to make gifts to the next generation during your lifetime.

For instance, you may wish to transfer your business or farm to one of your children who are working in the business or on the farm. Or, you may want to give your children a benefit now as they start out in their adult lives to help get them set up.

It is always vital to remember that you take measures and retain enough assets to maintain yourself for your lifetime, such as a nest egg for nursing home care or retaining a right of residence in the family home on the transfer the ownership.

WHAT RIGHTS DO SPOUSES AND CIVIL PARTNERS HAVE TO INHERIT?

Under the law in Ireland, spouses and civil partners have an automatic right to inherit half of their spouses estate if they die leaving no children and one third of the estate if they die leaving children if a will has been made. If there is no will and no children the spouse is entitled to all and if children to two thirds.

If you decide to leave your spouse or civil partner out of your will completely then this right automatically kicks in.

Not only that, but if you decide to give them a gift in the Will which is less than their legal right, they can then elect to choose between the gift in the Will or the legal right share.

If there is no will and no children the spouse is entitled to all and if children to two thirds.

CAN A TRANSFER OF ASSETS BEFORE DEATH BE MADE TO AVOID THIS?

It is very important to be aware that if a person decides to gift assets during their lifetime for the sole purpose of avoiding their legal obligations a court if satisfied this was the sole reason for the disposition can nullify any transaction which was made within 3 years of the death of the deceased.

WHAT RIGHTS DO CHILDREN HAVE TO INHERIT?

As with spouses and civil partners, there are also legal obligations owed to children.

However, while children have a right to look for something out of the estate of their deceased parent, this is not an automatic right. They have to prove that the parent failed in their moral duty to make proper provision. Section 117 application

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WHAT TAXES AFFECT ESTATE PLANNING?

Capital Gains Tax

CGT is payable on lifetime gifts and is payable on the increase in value of the asset from the date of acquisition of the asset by the donor to the date of disposal.

Stamp Duty

Stamp duty is payable on the transfer of property during the lifetime of the donor it does not apply where property is transferred on the death of the donor. The current stamp duty rates vary depending on whether the property is commercial or residential:

RESIDENTIAL 1% of value of property up to the value of € 1 million and 2% on anything above € 1 million

COMMERCIAL 2% of the value of the property

Capital Acquisitions Tax

CAT is payable by the person receiving any gift whether by inheritance or lifetime gift and is probably one of the most important issues to consider when planning for the next generation. The current thresholds are:

GROUP A	(child)	€ 310,000
GROUP B	(parent, sibling, niece / nephew, grandchild)	€ 32,500
GROUP C	(any other person)	€ 16,250

One of the most noteworthy implications of the current tax regime is that spouses and civil partners are not liable for CAT.

However, in a society where co-habiting couples are becoming the norm, the tax threshold is a mere € 16,250. This could result in a high tax bill for the surviving person depending on the circumstances.

Planning ahead is vital in these circumstances to avail of reliefs such as family home relief or putting in place an insurance policy or mortgage protection policy to assist with the tax implications.

There are a number of reliefs available for CAT such as family home relief, dwelling house relief, business relief, agricultural relief and even favourite niece and nephew relief. However, these reliefs may not always be available.

In 2009, the threshold for a child who received a gift from a parent was in excess of € 540,000. This threshold now stands at € 310K

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WHY IS IT ADVISABLE FOR PARENTS OF MINOR CHILDREN TO MAKE A WILL TRUST?

The main reasons for parents, particularly where they have young children, would be to make provision for guardians of their own choice, to make sure that each child is properly provided for or to ensure that they have the right people in place to manage the assets. If both parents pass away when the children are young.

The recommended will for parents of young children is a will trust. The usual form of will trust has some basic features which can be developed, or changed, depending on the circumstances of the family.

Firstly, the will trust will appoint Executors. They will also act as Trustees.

WHAT IS THE DIFFERENCE BETWEEN ACTING AS AN EXECUTOR AND TRUSTEE?

- The role or function of the executor is to take all the necessary steps to under their will. Carry out their wishes.

- This would be important when the Executor collect the deceased assets and called out their wishes under their will.

- The role of the Trustee takes over. The trustee manages or looks after the assets until the children reach the age when they become entitled to the assets, in their own right.

HOW DO PEOPLE CHOOSE TRUSTEES?

I always say to my clients – choose someone that you know, like and trust. Remember, if anything happens you will be handing over responsibility and authority to them to look after your assets until your children are of a certain age.

It is also important to make sure that you are happy that the person has the ability to make the right financial decisions for your children.

ONCE THE TRUSTEE IS DECIDED ON, WHAT NEXT?

The next major decision that has to be made is the appointment of Guardians for your children who are under 18.

I can appreciate that this is probably one of the most difficult decision that any parent will have to make. The consequences of not doing so make it ever more important for parents to actually take the step.

HOW DO YOU DISTINGUISH BETWEEN THE ROLE OF TRUSTEE AND GUARDIAN?

Put simply – the Trustee can be likened to the money manager and the Guardian is the child manager.

ONCE PARENTS HAVE DECIDED UPON TRUSTEES AND GUARDIANS, WHERE DO YOU GO FROM THERE?

After that you get in to the actual creation of the trust and setting out the powers that you are giving to the Trustees.

The creation of the trust, at its simplest, happens when the parent directs in the will that their assets are given to the Trustees and are to be held by them for the benefit of the children, and once the children reach a certain age then the trustees must handover the trust property to the children.

CAN THE MONEY OR PROPERTY BE ACCESSED BY THE TRUSTEE FOR THE CHILDREN BEFORE THEY COME OF AGE?

The Trustee can pay out a portion of the capital or income if it is required

for the children. E.g. for school or college expenses.

If the Guardian needs money to get the children back to school items or money for college then the Trustee has the power to make a payment out to fund those expenses.

While the Trustee can also act as Guardian it might be worthwhile assigning the roles to different people so that you don't have a Guardian with a potential conflict of interest if they have to make financial decisions.

WHAT HAPPENS IF YOU HAVE A CHILD THAT HAS A DISABILITY AND WILL NEVER BE ABLE TO MANAGE HIS/HER OWN AFFAIRS?

In that situation a parent would be advised set up a discretionary trust will. The will directs the Trustees to use the money or assets for the maintenance of the child, but the Trustees have absolute discretion how and when the money is used, if at all.

The beneficiary of the Trust will is not automatically entitled to the money or assets in this case.

This Trust mechanism is very useful if the family has a child with special needs.

The Trust can operate to protect their state benefits while creating a fund for their benefit.

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