WILLS AND LASTING POWERS OF ATTORNEY (LPAs)

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Making sure you have an up-to-date Will is a vital, but often overlooked, part of a good financial plan. Without a Will, your wishes may not be carried out on death. This can include important decisions on the guardian chosen for your children, or your burial arrangements. No Will also means the **laws of intestacy** govern the distribution of your assets. This means assets may not pass as you would wish, and the distribution may not be particularly tax efficient.

Even more frequently overlooked is the importance of having Lasting Powers of Attorney (LPAs) in place. You may not always be able to manage your personal health or financial affairs, whether on a temporary or more permanent basis. If LPAs are not already in place, an application to the **Court of Protection** must be made to enable decisions to be taken on your behalf. This can cause long delays, increase stress, and increase costs. It can place restrictions on the decisions made on your behalf and mean that decisions are taken by someone who may not be aware of your wishes.

Here we give an overview of factors to be aware of when considering setting up these vital legal documents. Although you can set up Wills and LPAs yourself, for anything but the most simple situations we always recommend taking professional legal advice.

This note focuses on the rules applying in England and Wales, the law in Scotland and Northern Ireland differs.

WILLS

WHY MAKE A WILL?

A Will is one of the most important personal legal documents that you can execute. A legally valid Will ensures that your wishes are carried out on death. It can also help to minimise any tax to be paid, for example by ensuring full use of the Residence Nil Rate Band or making use of charitable donations to reduce the rate of Inheritance Tax applied.

It should name the **executors** whom you wish to deal with your affairs and assets after your death and set out the **beneficiaries** whom you wish to benefit. You can also include direction on other matters such as the appointment of guardians for infant children or your funeral arrangements.

JOINT TENANTS OR TENANTS IN COMMON?

Where assets are held jointly, it is important to note exactly how they are held, and check whether this means they will pass according to your wishes on death.

Any assets which are held as **joint tenants** (e.g. joint bank accounts or investments, jointly held property) are not **subject to either the terms of a Will or the laws of intestacy**. These assets pass automatically to the surviving co-owner - this is called survivorship.

It can therefore be useful for couples to hold at least some assets jointly for continuing liquidity. For example, to ensure that household costs can continue to be met from a joint account whilst the process of probate holds up distribution of the remaining assets.

Any assets held as **tenants in common** will specify the percentage of the asset which belongs to each individual. This share will pass to beneficiaries according to the terms of their Will or the laws of intestacy.

LETTER OF WISHES

Many Wills contain some kind of trust, and you can write a letter to the trustees to explain your wishes surrounding the trust more fully. Such a letter (known as a **letter of wishes**) affords them valuable guidance. They can then refer to your express intentions and administer the trust as you envisage. Although it is not legally binding, it is an important document and careful thought should go into its preparation.

WILLS

WHAT IF I DO NOT MAKE A WILL?

If you die without making a Will then you are said to have died intestate and the laws of intestacy apply.

These laws might not be what you would have otherwise chosen. **It is a common misconception that in the event of your death everything will pass automatically to your spouse or civil partner.** This is not necessarily the case, as the table below outlines.

Any children who inherit in this way are **entitled to access the whole of their inheritance from age 18**, which may not be advisable for significant amounts. **Step-children and foster children are not provided for at all by these rules.**

Even if the intestacy rules do, in fact, reflect your basic wishes, they make no provision for legacies or mementoes to friends, other relatives, charities, or for appointment of guardians. The distribution of assets may also not be tax efficient.

English and Welsh Intestacy Rules		
Family Situation on Death	**Beneficiary**	**Beneficiary Entitlement**
Surviving Spouse / Civil Partner AND Surviving Children / Grandchildren / Direct Descendants	Spouse / Civil Partner	£322,000 (the 'Statutory Legacy') Personal Chattels Half of the Residue
	Children	Half of the Residue (once aged 18)
Surviving Spouse / Civil Partner BUT NO Surviving Children / Grandchildren / Direct Descendants	Spouse / Civil Partner	Whole Estate
No Surviving Spouse / Civil Partner		Whole Estate to nearest group of relatives, in equal shares. Order of Groups is: Children, Parents, Siblings, Half-Siblings, Grandparents, Aunts / Uncles, Half-Aunts / Uncles, and finally the Crown.

WILLS

WHAT IF I DO NOT MAKE A WILL?

Not Married?

If you are **co-habiting but not married**, your partner is not automatically entitled to benefit under intestacy law, no matter how long-term the relationship. **Contrary to popular perception, a 'common law spouse' is not a legal concept**. Of course, if you have children, they will be your next of kin.

In these circumstances, your partner may be able to bring a claim against your estate, for family and dependant's provision. This procedure, which may involve court proceedings, can be laborious, expensive and time-consuming.

Other than holding sufficient assets as joint tenants, the only way to prevent this situation is to make a Will.

Administration

The law also nominates the person who will deal with your affairs and the distribution of your estate (the 'administrator'). It is normally more costly and time consuming for the necessary paperwork to be completed under intestacy than if the individual has made a Will. In addition, if there are children under age 18, there will normally be costs associated with administering the statutory trusts.

WHAT AFFECTS AN EXISTING WILL?

Once a Will has been properly made, it remains valid until either:

- You revoke it
- You make a new Will
- You get married or enter a civil partnership – this automatically revokes a Will in England and Wales

Note that divorce, or the dissolution of a civil partnership, does **not** automatically invalidate a will. Your ex-spouse/civil partner would not, however, be able to be executor or beneficiary.

If you make a new Will, you should notify any people who hold copies of your old Will in order that these can be destroyed.

WILLS

WHEN SHOULD I REVIEW MY WILL?

It is important that you periodically review your Will in all cases to make sure it remains up to date. It is likely that both your financial situation and your personal circumstances will change over time, and it is vital that your Will reflects this.

Small changes can usually be made by way of a Codicil (a legal document adding to the existing Will). Larger changes are more easily made by revoking your old Will and making a new Will.

Trigger points for review include:

- Marriage (of yourself or a beneficiary)
- Divorce or separation
- Birth of a child or grandchild
- Changes in wealth
- Tax changes
- Concerns relating to a beneficiary's capacity to make good
- Illness/disability of a beneficiary
- Bankruptcy/concerns as to a beneficiary's ability to deal with money

THINKING AHEAD

To help your executors, you should:

- Tell executors where your original Will is stored
- Keep a list of your assets including contact details, not forgetting any online assets
- Keep a note of where any significant documents are held (title deeds, life policy documents, investment certificates etc)
- Keep good records of financial gifts made to facilitate Inheritance Tax returns and ensure that any tax planning carried out during your lifetime is effective. Depending on the type(s) of gift(s) made, this may require keeping comprehensive details of income and expenditure

LASTING POWERS OF ATTORNEY (LPAs)

A Lasting Power of Attorney (LPA) is a legal document that allows you to appoint someone you trust as an attorney to make decisions on your behalf. It can be made at any time whilst you have **capacity** but can only be used after it is registered with The Office of the Public Guardian.

TYPES OF LPA

There are two different types of LPA – a **health and welfare LPA and a property and financial affairs LPA**. You may appoint the same person as your attorney for each LPA, but **two separate applications must be made**.

- **Health and Welfare LPA**

  This enables you to choose someone to make decisions on your behalf regarding your health and welfare. This includes decisions to refuse or consent to life-sustaining treatment on your behalf and deciding where you live.

  Decisions can only be made if the LPA is registered, **and** you lack the mental capacity to make the decisions yourself.

- **Property and Financial Affairs LPA**

  This allows you to choose someone to manage your finances whilst you still have capacity (if you wish), **as well as** when you lack capacity. There are many reasons why you may find this helpful, for example, if you find it difficult paying your bills or dealing with banks over the telephone. Your attorney would be able to pay your bills and help sell your house.

WHO CAN MAKE AN LPA?

Anyone who is aged 18 or over and has capacity to do so. **You cannot make an LPA jointly with another person**; each person must have their own LPA.

You can cancel your LPA at any time so long as you have the capacity to do so.

HOW MANY PEOPLE SHOULD YOU APPOINT?

You only need to appoint one attorney. Preferably you would **appoint at least two - or appoint one with a replacement attorney available** if needed. This is to cover times when your attorney is out of the country or if your attorney was no longer able to act, to ensure there is someone in place who can continue looking after your affairs. Your attorneys should be people that you trust and have your best interests at heart.

WHAT IF THERE IS NO LPA IN PLACE?

Should you lose mental capacity, it will be necessary to apply to the **Court of Protection** to appoint someone to act as a deputy. This can be a long, drawn-out process and the costs involved are significantly higher. The application is made by the individual wishing to act as your deputy who, of course, may not be your first choice. Whilst the application is with the Court, there will be no-one in place to be able to assist you with your affairs.

Important Information: Our views are based upon our understanding of current legislation in England, unless stated otherwise. Levels and bases of, and reliefs from, taxation are subject to change and their value to you will depend upon your personal circumstances.

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