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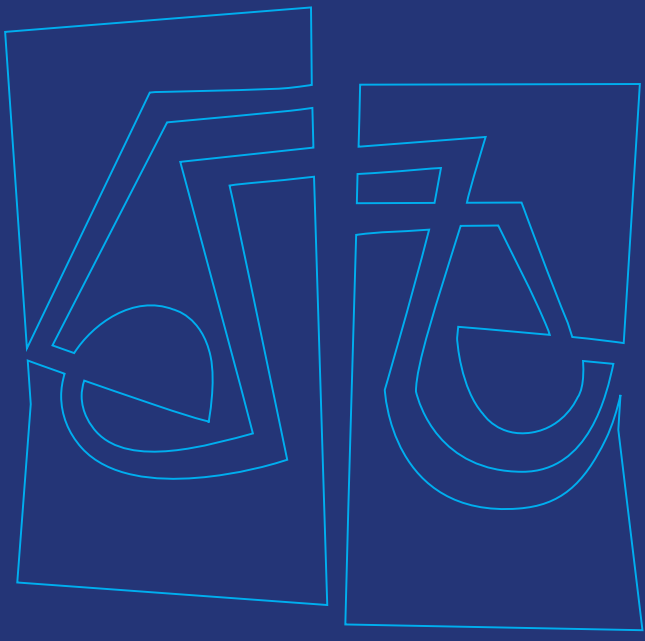
promoting access to justice

wills and intestacy



You may also be interested in FLAC's leaflet on 'Probate' which covers the process of carrying out the provisions of a will.

Wills and Intestacy are governed by the Succession Act 1965

Why should I make a will?

A will is the only way of safeguarding the future of those whom you care for. When you die, your affairs must be wound up. There are likely to be outstanding bills to be paid as well as property which needs to be distributed.

Making a will simplifies all of this. It allows you to decide who gets what, with minimum delay and hassle. Without a will, the distribution of your assets will be determined by law - the law of intestacy (see below) - and therefore people outside your family will not receive anything and/or members of your family may not receive what you would have wished. A will can also be used to exempt your next of kin from paying tax.

It is **very important** for you to make a will if you have any children under 18 or any long-term dependents. You can also draw up a document to appoint a **testamentary guardian** to a child or include a term to this effect in your will. This is a trusted person who will be responsible in part or in full for the welfare of any children under 18 in the event of your death.

How do I make a legally valid will?

There are very strict guidelines as to what makes a will valid. These are:

1. The testator (person who makes the will) must be **over 18 years of age** (or be married; however, unless you get a Court Exemption Order, the legal age of marriage is 18).

2. He/she must act of his/her own free will – not under pressure from another person.

3. He/she must be of sound mind and memory and understand that he/she is making a will.

4. The testator must know the nature and extent of his/her property and be capable of naming all of the people who may expect to benefit from his/her estate.

5 The will must be **in writing**.

6. The will must be signed at the end by the testator. If the testator cannot sign it then he/she must direct someone else to do so in his/her presence. The 'signature' can be the initials of the testator or, if the testator is physically unable to sign or illiterate, then it could be a mark made by him/her.

7. That testator's signature must be made in the presence of TWO witnesses who are both present at the same time.

8. The witnesses must sign their signature in the presence of the testator, ideally in the presence of each other but not necessarily so.

9. A witness or his/her spouse **cannot** benefit under the will.

Where these formalities are not respected, the will may fail and, if so, the law in relation to intestacy will then determine how your property is distributed.

Can I draw up the will myself and save costs?

Due to the complex rules for making a will, you should seek the advice of a solicitor. All too often a will can fail due to one of the rules not being correctly carried out which means that the dead person's wishes may not be respected. Your will is open to challenge if it does not meet all the legal requirements. Also, you may not be aware of the full range of issues that your will can cover and provide for. However, it is possible for a non-lawyer to draw up and execute a valid will without legal advice.

What is an executor?

The executor is the person named in the will who has the job of carrying out the terms of the will. Preferably, there should be more than one executor.

Executors can benefit (receive property, money or a gift) from the will. However, no witness to a will or the spouse of that witness can benefit. They must be over 18 and not suffering from a legal disability: this is when a person is barred from performing certain duties because they may, for example, not be of sound mind or have been declared a bankrupt. Otherwise they cannot get a grant of probate. A grant of probate allows the executor to deal with the deceased person's assets.

What sort of things should I think about including in my will?

You will need to think about the people who will be affected by your will - if you have any spouse or partner, current or former, civil partner, any children, grandchildren and so on. You will need to think about any properties you own or co-own, both in Ireland and abroad. Have you made any foreign wills? Do you have any other interests at home or abroad? What items of value do you own - car, jewellery, shares, unit trusts, furniture,

bank accounts and so on? Do you have any pensions or life insurance or endowment policies, and what arrangements are provided in them should you pass away? Joint accounts should be carefully examined as it is not automatic that the other account holder will take over on your death.

What do I need to include in my will?

- ✔ Name and address of the testator.
- ✔ A revocation (cancellation) of any earlier wills.
- ✔ The appointment of executors – preferably more than one, giving addresses and relationship to you, if any.
- ✔ A list of legacies (gifts of money or goods).
- ✔ A list of devises (gifts of real property, such as land).
- ✔ A residuary clause – this lays out how any left-over estate (possessions or property) should be distributed.
- ✔ The date. If this is absent, a witness will have to swear as to the date of the will.
- ✔ The signature of the testator at the end of the will.

An **attestation clause**, which is evidence that the testator signed the will in the presence of two witnesses and that the two witnesses each signed the will in the presence of the other. If this is absent the will is not invalid, but the Probate Office will require an affidavit from one of the witnesses.

An example of an attestation clause:

"Signed, published and declared by said testator as and for her last will and testament in our presence who in her presence and at her request and in the presence of each other we have hereunto subscribed our names as witness, this will having been printed/written on one single A4 page."

In the past, **testator** was the word used if the person making the will was male and **testatrix** if female, but 'testator' is now commonly used for both men and women.

Can I change my will?

You may change or alter your will at a later date. It is a good idea for a person who has made a will to read over and review their will for any changes every five years or so. All changes, additions and alterations must be signed, dated and witnessed in the same way that the will was made.

Can I make more than one will?

You may make more than one will, for example, when you own property in more than one country. If you want to make a completely new will regarding certain property, you must **revoke** (cancel) a previous will that also deals with the same property.

Revocation of a will is automatic where:

- If you marry or enter into a civil partnership, your will shall be revoked, unless you had made your will in contemplation of that marriage or civil partnership.
- If you make another will, the first will you made shall be revoked.
- If you draw up a written document that is executed in accordance with the requirements for a will, your first will shall be revoked.
- If you burn, tear or destroy your will, it will no longer be considered valid. Or, if you have someone else destroy it, your will shall be revoked, provided this was done in your presence, with your consent, and with the intention of revoking your will.

So can I decide who gets what?

- You may lay down in your will which persons you choose to receive property or an asset and it is for you to decide the way in which your estate will be divided up. However, over and above this, the law ensures that your surviving **husband or wife** receives a specific portion of your estate called the 'legal right share'. This will be one half of your estate if there are no children and one-third of it if there are.

- **Civil partners** enjoy the same 'legal right share' as spouses, which is one half of the estate if there are no children and one-third if there are children. A spouse or civil partner may renounce their right to a legal share, in writing. A civil partner is defined in law as either of two persons of the same sex who have entered into a currently valid, legally recognised civil partnership or other legal relationship accepted under the Act. Civil partners enjoy the same succession rights as spouses in that, once registered, civil partners will be subject to automatic succession rights on the death of each other. Similar to married persons, their testamentary freedom will be then considerably restricted.

Civil Partnership Act 2010

- Unlike civil partners, **cohabitants** do not have automatic succession law rights to the estate of their deceased partners. Instead, there is a redress scheme that allows a qualified cohabitant to apply for provision from the estate of the dead person. A 'qualified cohabitant' means that you have been cohabiting with the person for five years or longer if there are no children) or for two years or longer if you have a child or children together. There is a six month time-limit under the legislation within which a qualified cohabitant must make such an application. Further, in making provision for an applicant under the redress scheme, the court cannot exceed a share greater than what a spouse or civil partner would be entitled to either on intestacy or by way of a legal right share. Where a deceased cohabitant was married at the date of death, an application brought by a cohabitant cannot affect the legal right share of the spouse.

Part 15 of the Civil Partnership Act 2010

What about providing for my children?

The law provides that some payments made to a child during a testator's life will be assumed to be made towards satisfying that child's inheritance. This covers payments considered to be the 'permanent provision' for a child.

If a payment made to a child during the testator's lifetime was not intended to satisfy the child's inheritance, this should be declared by will.

You should note that your children **do not have an automatic right to inherit** from you. Therefore you should clearly provide for them in your will stating what share goes to what child.

Section 117 of the Succession Act 1965

However, if a child or his/her guardian feels that proper provision has not been made for him/her in the will, he/she can apply to court to have this matter considered. The court will then decide whether or not the deceased parent has failed to make proper provision for that child in the will. Where the court believes that the testator has failed in his or her moral duty to make proper provision for the child in accordance with his or her means, whether by his will or otherwise, the court may order that proper and just provision be made for the child out of the estate.

Note that a 'child' under section 117 can also refer to a person aged 18 years or more. If you are a child or adopted child of any age, you may apply to the courts under section 117.

What are trustees?

If your children are very young, you may wish to put a bequest aside for them until they reach a specific age. Likewise, you may wish to bequeath to a person who requires assistance to manage his or her affairs. In this instance, you can appoint trustees who can hold the bequest in trust for the beneficiary until he or she reaches the specified age, or on an on-going basis if needed. The trustees can benefit from the will also. They will have the power to look after and pay out, in part or full, the bequest on behalf of the beneficiary, as specified in the will. You will need to state in the will what happens to any unused portion of inheritance should the beneficiary die.

A trust might also be used if the beneficiary is incapable of managing his or her affairs for whatever reason.

What are guardians?

A guardian is the person or persons you name to act as parent should you die before your children reach the age of 18. This is not the same role as a trustee, who manages the fund or inheritance of the child, but guardians can also be trustees. Unless you have named persons to act as guardians in your will, then on your death your relatives will have to apply to the court to have a guardian appointed to the children. Therefore you are strongly advised to name guardians for your children in your will, taking into account issues like how and where you would like to see them reared and what provisions might be made for their education, for example.

How can I provide for my spouse or partner?

If you die leaving a will, otherwise known as testate, no matter what you put in your will your wife/husband is legally entitled to

a) one-third of your estate, where you have surviving children; or

b) half of your estate, if you do not have any surviving children.

This is on top of any **joint property** you may have with your spouse, which should be considered also when you are making your will.

Where there are joint bank accounts, it must be noted that this is legally complex and involves matters such as the terms of the bank contract, what exactly you and your joint holder intended when you set up the account, and how much you each contributed to the account. It is especially contentious where the joint account holder is not your spouse or child. It is therefore very important that you leave specific written instructions in your will and to the other joint account holder as to who will inherit your share of a joint account, taking into account the issues mentioned above.

What about my ex-partner?

You can reduce conflict over entitlements after your death by specifying in your will what provisions are to be made for any ex-partners.

- If you are **divorced**, the terms of the court order will determine any claims from your ex-spouse. This is because although divorce 'extinguishes' or removes inheritance rights, provision may be made for future supports to a spouse from your estate at the time of divorce in the court order.

- **Legal separation or judicial separation** does not extinguish succession rights automatically, but may do depending on the terms of the separation agreement or judicial separation – you will have to investigate this when you are making the will.

Joint properties

It is also important to note whether the joint property is a joint tenancy (where the surviving party will automatically inherit on your death) or a tenancy in common (the surviving partner does not have any automatic right to your share and you can bequeath it to any beneficiary/beneficiaries in your will).

Intestacy

Where a person has not made a will or the will they have made is found to be invalid, that person is said to have died intestate. In this case, his or her property is distributed according to the law of intestacy laid down in the Succession Act 1965. Where some of those who would have inherited have died before the testator, their children may be entitled to share in the estate.

Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010

Since 2011, the law has changed to make provision for civil partners in relation to their legal right share in the event of intestate succession. Part 8 of the Civil Partnership Act 2010 provides that on intestacy, a surviving civil partner is entitled, as a right, to the same share as a surviving spouse; in other words, to two-thirds of the estate where there are children and to the entire estate where there are no children.

Relative surviving	Share
Spouse/civil partner and children	Spouse/civil partner take two-thirds and children take the remainder
Spouse/civil partner and no children	Spouse/civil partner takes whole estate
Children and no spouse/civil partner	Children take whole estate
Father, mother, brother and sisters	Each parent takes one half
Parent, brothers and sisters	Parent takes whole estate
Brothers and sisters	All take in equal shares.
Nephews and nieces	All take in equal shares

Will the beneficiaries have to pay tax?

Beneficiaries may have to pay Capital Acquisitions Tax (CAT) if the amount of the benefit - combined with any other benefit previously taken – is over a certain threshold. The thresholds vary depending on what the family relationship is with the dead person. Inheritances from parent to child and usually from child to parent have a higher threshold than those between other relatives. **Spouses or civil partners are exempt from inheritance tax**. Inheritances from distant relatives or non-relatives have a lower threshold.

Deadlines: Any person who inherits on the death of another person is legally responsible for paying his/her Capital Acquisitions Tax before the relevant deadline. (However, if the person who gets a benefit is living outside the state, then the executor / administrator or his/her solicitor must act as agent in dealing with the tax liability.) The relevant payment date is either 31 October of the same year where the inheritance is received between 1 January and 31 August, or 31 October of the following year where it is received between 1 September and 31 December.

Finance Act 2010

If you miss the deadline for paying your tax, you will have to pay interest on the amount owed starting from the valuation date. Note that any payments you then make will first go towards paying off the interest, before the tax you actually owe.

Valuation date: The valuation date is the date on which the market value of the asset being inherited is calculated. This may be the date of death, the date of grant of probate or the date of transfer to the beneficiary, depending on the circumstances. See more at http://www.revenue.ie/en/tax/cat/guide/valuation-date.html

Tax rates: The standard rate of tax is 33% in respect of gifts and inheritances taken on or after 6 December 2012.

YEAR	Group A	Group B	Group C
	(Son/Daughter)* (after indexation)	(Parent**/Brother/Sister/Niece/ Nephew/Grandchild) (after indexation)	(Relationship other than at A/B) (after indexation)
On or after 06/12/2012	€225,000	€30,150	€15,075

*Includes children of civil partners

**In certain circumstances a parent taking an inheritance from a child can qualify for Group A threshold.

These thresholds change regularly and you can find up-to-date figures online at http://bit.ly/cat_thresholds.

Are there any exemptions to CAT?

The tax exemption of Dwelling-House Relief means that a person who receives a gift or inheritance of a dwelling house will not have to pay Capital Acquisitions Tax on it, provided that:

- He/she has lived in that house for three years prior to the date of the gift/inheritance.
- After the date of the gift/inheritance, he/she is not beneficially entitled, in whole or in part, to any other dwelling house, does not own or co-own another house.
- At the date of the gift/inheritance of that house, the person continues to live there for a period of 6 years, unless they are 55 years or over.

Further Information

Questions about inheritance tax and probate may be made by emailing captax@revenue.ie or by phoning the Revenue's taxpayer information unit on LoCall 1890 201104.

You may also find out about thresholds for CAT which is levied on gifts and inheritances on the Revenue Office's website www.revenue.ie

Can I get legal aid to help make my will?

You may be eligible for legal aid if you are a person of moderate means. To qualify for legal aid in civil cases your disposable income and assets must be below a certain limit, there must be merit to the case and there must be no other satisfactory way of resolving the problem. After approval, the Legal Aid Board provides you with the services of a solicitor and, if necessary, a barrister. You can apply for legal aid for more than one matter at a time. The Board's offices are called Law Centres and are located around the country. For the location of your nearest Law Centre, call 1890 615 200.

All those who are granted legal advice and/or legal aid must pay a fee called a contribution to the Board. The minimum contribution is €30 for legal advice and €130 for legal aid. Law centre staff will advise what a person's actual contribution will be as each person is assessed on an individual basis

Before you qualify for legal aid, you must first satisfy a means test. Your disposable income must be less than €18,000 and your disposable capital cannot be more than €100,000.

If you are in receipt of allowances, they will be taken into account and they are deductable when calculating disposable income. The maximum allowance on childcare facilities if you are working is €6,000 per child

per year and the maximum allowance on accommodation costs (e.g. rent) is €8,000 per year. The Public Service Pension Related Levy and the Universal Social Charge are now also considered and are deductible for the purposes of assessment.

The value of an applicant's home and its normal contents are excluded when assessing the value of his/her capital resources (property). If your capital resources exceed €4,000, you must complete a Statement of Capital.

For further details on financial eligibility requirements or for details of other allowances, contact your local Law Centre. A full list is available at www.legalaidboard.ie. FLAC has prepared a guide to the state legal aid system which you can download at bit.ly/CLAflacsheet.

Need more information?

Legal information leaflets are also available from FLAC on a variety of other areas of law. They are free to download as PDFs from the FLAC website or in print from your local FLAC centre or Citizens Information Centre.

Notes

FLAC Mission Statement

FLAC (Free Legal Advice Centres) is a human rights organisation which exists to promote equal access to justice for all.

FLAC is grateful to John Costello, solicitor, for his help in updating and revising this leaflet.

FLAC offers free, confidential basic legal information via its lo-call telephone information line at 1890 350 250 and one-to-one legal advice through its network of voluntary advice centres countrywide – www.flac.ie/help

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