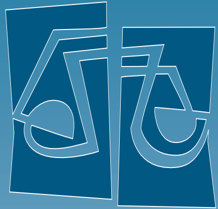
wills and intestacy



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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 and allows you to decide who gets what, with minimum delay and hassle.

Without a will, the fate of your assets will be determined by law - the law of intestacy (see below for explanation), and therefore people outside your family will not receive anything or members of your family may not receive what you would have wished.

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.

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.
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 recalling 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, but not necessarily in each other's presence.
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 it is advisable to seek the advice of a solicitor. All too often a will can fail due to one of the rules not being correctly carried out and then later the deceased's wishes may not be respected. However, it is possible for a lay person 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 they will lose any benefit if they or their spouses have also acted as a witness. 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 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 i.e. 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 a subscribing witness.

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 (number and size of pages, e.g. one single A4 page)."

Testator was used if the person making the will is male and **testatrix** if the person is 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.

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, there is a law which will ensure 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. A spouse may renounce their right to a legal share.

Your children do not have an automatic right to inherit from you, but there is a law that allows a child to bring an application under section 117 of the Succession Act. This provides that if, after your death, that child or their guardian feels that proper provision has not been made for them in the will, they 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 their will.
A 'child' under a section 117 does not mean

that an applicant must be aged less than 18 years. If you are a child (also adopted or a step-child) of any age you may apply to the courts under section 117.

Under the Succession Act 1965 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 which are considered to be the 'permanent provision' for a child. If a parent intends any such payment to be disregarded at the time of death, this should be declared by 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. Where a person dies intestate, their 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.

Distribution of estate on intestacy

Relative Surviving	Share
Spouse and children	Spouse takes two-thirds and children take the remainder
Spouse and no children	Spouse takes whole estate
Children and no spouse	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

Tax

The person who gets a benefit on the death of another 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. There are different tax thresholds for this. Inheritances from parent to child and usually from child to parent have a higher threshold than those between other relatives. Spouses are exempt from inheritance tax.

Inheritances from distant relatives or non-relatives have a lower threshold. An executor or administrator must ensure that anyone liable for inheritance tax pays what is due promptly as the executor may be personally liable if it is not paid.

Group	Relationship to Deceased	Group Threshold 2007	Group Threshold 2008	Group Threshold 2009
A	Son/Daughter	€496,824	€521,208	€542,544
B	Parent/Brother/Sister Niece/Nephew/ Grandchild	€49,682	€52,121	€54,254
C	Relationship other than Group A or B	€24,841	€26,060	€27,127

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 CAT on this 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 and looking under leaflets and guides, capital acquisition tax, gift tax or inheritance tax.

Legal Aid

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 more satisfactory way of resolving the problem. After approval, the Legal Aid Board provides you with the services of a

solicitor and, where 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 €10 for legal advice and €50 for legal aid. The law centre staff will advise a person of the actual contribution in each individual case.

As of 1 September 2006 the new **disposable income** limit of a person applying for legal aid has been increased from €13,000 up to €18,000 per year.

The **maximum allowance** (this is an expense which the rules allow you to deduct when calculating your disposable income) on childcare facilities if you are working is €6,000 per child per year. The maximum allowance on accommodation costs (e.g. rent) is now €8,000 per year.

The value of an applicant's home and its normal contents are excluded when assessing the value of his/her capital resources (property), as are the value of the tools of an applicant's trade.

For details of other allowances, contact the Legal Aid Board or your local Law Centre.

notes

FLAC Mission Statement:

FLAC is an independent human rights organisation dedicated to the realisation of equal access to justice for all. It campaigns through advocacy, strategic litigation and authoritative analysis for the eradication of social and economic exclusion.

While every effort has been made to ensure the accuracy of this leaflet, it is provided for general legal information only and is not intended as a substitute for legal advice. FLAC does not accept any legal liability for the contents of this leaflet. Persons with specific legal problems should consult a solicitor.

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