

A Guide to Will Planning for married couples with children

Do we need to make a Will?

Every adult should have an appropriate up to date Will in place. This is the only way to ensure that your family and loved ones will be provided for out of your Estate in the way you would want.

It is a common misconception that everything always passes to a surviving spouse automatically in any event. In the typical family scenario of spouse and children in fact only the first £250,000 of assets in the name of one spouse (including the value of any life policies unless these have been 'written in trust') will pass outright to the surviving spouse in the absence of a Will.

If you have young children it is important to make a Will to choose to whom you would wish to pass parental responsibility for them (as testamentary guardians) if neither of you were living and also to decide who in that case should manage their inheritance for them until they reach an appropriate age (as Trustees of your Will).

Does the Will need to be complicated?

For couples who wish to benefit each other first and foremost and then the children the simplest option may be to provide in your Will that everything should pass to the surviving spouse with provision to take effect in the survivor's Will leaving everything to the children in equal shares at a particular age.

However, these typical 'mirror wills' for married couples do not take into account the possibility that the survivor might remarry (or may already have children from an earlier relationship) and choose ultimately to pass some or all of the assets from the first spouse's estate to beneficiaries the first spouse would not have chosen.

It is possible to include trust arrangements in the wills so as to allow the surviving spouse to have access and enjoyment of all assets but so that some or all the share of the deceased spouse is ring-fenced for the ultimate benefit of your children (and cannot be redirected by the survivor's Will). This is more complicated and does mean the survivor would not have unfettered access to the overall estate.

What about Inheritance Tax?

From an Inheritance Tax perspective, anything passing from one to the other of you is generally exempt (unless the surviving spouse is 'non UK domiciled' in which case only a limited exemption is available).

Every individual can leave up to a certain amount to non exempt beneficiaries (for example your children) without any Inheritance Tax being due. This is the 'nil rate band' which is currently set at £325,000 per person. If a person dies and more than the nil rate band has passed to non exempt beneficiaries the amount by which the nil rate band is exceeded is taxed at 40%. Gifts made to non exempt beneficiaries within the 7 years before a person dies may be taken into account when determining whether the nil rate band has been exceeded.

Under new tax rules if one spouse does not use the nil rate band (for example because everything is simply left to the surviving spouse and is therefore exempt) the unused nil rate band can effectively be carried forward to the estate of the surviving spouse. This effectively gives married couples an Inheritance Tax threshold at current rates of up to £650,000 on the death of the surviving spouse.

Do I need to make special arrangements in relation to my business?

Businesses (and farming) interests may if certain criteria are met pass free of Inheritance Tax to a non exempt beneficiary. For this reason passing an interest in a family business straight down to the next generation (or to a flexible trust from which the surviving spouse and future generations can benefit) may be the most tax efficient option.

As well as making an appropriate Will you need to check on any legal documentation connected with the business. These documents (for example the company 'articles of association' or any partnership or shareholder agreement) often give other parties with an interest in the business an option to buy up your interest from your estate. If this is not in line with your wishes then further action will be needed.

What sort of provision should we make for young children in case neither of us is living?

If you are making a gift to minor children you can specify an age beyond 18 at which they would become absolutely entitled (commonly up to the age of 25).

If a beneficiary is under 18 generally his or her inheritance will need to be held 'in trust' by at least two 'trustees' who you can name in your Will (normally but not always the same people as your executors). This is a big responsibility and many people choose to involve a solicitor or other professional as Trustees (sometimes alongside a family member) so that there is a neutral party who is only concerned to give effect to their wishes and to ensure the necessary expertise and advice is available to deal with everything in the most appropriate and tax efficient manner. The Trustees should take advice from an Independent Financial Advisor as to how best to invest the trust funds. Some people wish to have the individuals they have named as guardians to control the trust funds others would prefer to have different individuals in the different roles as a 'check and balance'.

The Trustees have certain implied powers to apply income or capital e.g. for the maintenance education or benefit of young beneficiaries pending them reaching the designated age. Generally, the beneficiaries would begin to take income from the trust funds from the age of 18 even if they are not entitled to take control of their share of capital until a later age.

If you are thinking of extending any trust fund for the children beyond them reaching 18 you need to bear in mind that administrative and tax costs which will be associated with running the trust. Whilst the monies are held in trust the trustees would need to account for income and capital gains tax on any income and gains generated by the trust fund. In addition there can be charges to Inheritance Tax on the trust if the sums held in it are in excess of the Inheritance Tax threshold-typically at 4% on payments out of the trust and on the 10 year anniversary- if the trust remains in situ that long.

The administrative and tax costs associated with an ongoing trust (beyond the age of 18) for young beneficiaries need to be weighed up against the alternative scenario of them inheriting potentially very significant sums outright at age 18.

What about the situation where none of the immediate family are living?

You need to consider who you would want to benefit if neither of you or your children are living so that we can include these as 'longstop' or default beneficiaries.

This fact-sheet is intended only as an initial guide based on current laws and general principles and is no substitute for specific advice based on your individual needs and circumstances.

For further information and advice please contact Lisa Davies at Leo Abse & Cohen on 02920 507 473 or via email at lisad@leoabse.com