

# MAKING A VALID WILL

This document has been created by the Defence Forces Legal Advisor to CAOGA and is intended as a simplified explanation for members of CAOGA of the most frequently asked questions about making a valid Will and Succession Law. Where any doubt occurs concerning the interpretation of this document it is recommended that the member seek appropriate legal advice.

## 1. **Who Can Make A Will?**

Section 77 of the Succession Act 1965 sets out the capacity of persons to make a will. You must be 18 years old or over and of sound disposing mind.

## 2. **Why Should I Make A Will?**

A will is a clear legal document that provides for the distribution of your property once you die. By making a will you are allowing for the provision of special needs of family members. You can also utilise specialist advice to create a tax planning opportunity. By making a will, you can choose whom to appoint as your Executor to handle your affairs and to divide your estate in the manner that you desire. Failure to make a will means that your estate will be divided in accordance with the law of the land under Intestacy Provisions with the potential result of persons benefiting from your estate that you did not wish to so benefit.

## 3. **Who Should I Appoint as my Executor?**

An Executor is the person to whom the execution of a Will, i.e. the duty of carrying its provisions into effect, is confided by the Testator. The duties of an executor are to bury the deceased; to prove the Will; to collect the estate and, as necessary, to convert it into money; to pay the debts in their proper order; to pay the legacies and to distribute the residue among the persons entitled. It is the executors duty to notify a spouse in writing of the right of election between the spouse's legal right and any rights under the Will per Section 115 of the Succession Act 1965. Appointing a second executor is considered desirable since it covers the situation where one of the executors dies. It is important that the executor knows as much as possible about the deceased's affairs to prevent assets going untraced which could result in the depletion of the estate with the ultimate loss to the beneficiaries. A beneficiary can be appointed as an executor but should never be a witness to a Will because this could invalidate the gift. Persons to be chosen as executors should therefore be trustworthy and capable and you should have confidence in their ability to carry out your wishes as expressed in your Will.

## 4. **Can I Make My Own Will?**

In short the answer is yes. However, remember that your Will may be the most important document that you ever sign and you should give the matter serious consideration. There are strict legal requirements governing the format of Wills and divergence from these could see your Will being held legally invalid. This

will result in an administrator being appointed and your property being distributed according to the laws of intestacy. This could result in persons benefiting that you did not wish to. Several Solicitor Firms will now draft your first Will for no fee with subsequent charges for amendments. It is advisable to shop around for the best options for you. There is no requirement for you to deposit your Will with a Solicitor.

#### 5. **What is Testate/Intestate Succession?**

Testate succession means the devolution of property where the deceased made a valid Will. Intestacy means dying intestate, i.e. without making a valid Will. Partial intestacy is the leaving of a Will which validly disposes of part only of the property of the deceased so that the rest goes on intestacy.

#### 6. **Intestate Succession**

The residuary estate of an intestate devolves according to Sections 66 to 73 of the Succession Act 1965 (as amended by the Family Law (Misc. Provisions) Act 1997;

- (i) if there is a surviving spouse and issue, the spouse takes two-thirds and issue take one-third
- (ii) if there is a surviving spouse and no issue then the spouse takes all
- (iii) if there are issue and no spouse, the issue take all; if they are in equal relationship to the deceased, the distribution is in equal shares among them; if they are not, it is *per stirpes* (in equal shares)
- (iv) if there are no surviving issue or spouse, the parents of the deceased take all in equal shares; if only one parent survives, that parent takes all
- (v) in the event that there are no such survivors, the estate is distributed among brothers and sisters in equal shares. If a brother or sister does not survive the intestate, the children of that brother/sister represent their parent and divide his/her share. If the intestate leaves no surviving brothers or sisters then the estate is distributed in equal shares among the children of his brothers and sisters and not *per stirpes*
- (vi) in all other cases, the estate is distributed in equal shares among the next-of-kin.
- (vii) In default of next-of-kin, the estate passes to the State as the ultimate intestate successor.

#### 7. **What are the rights of a Spouse Under The Succession Act 1965?**

The Act provides that at all times the surviving Spouse will be entitled to a share as a legal right. The Act deals with where there is a Will and where a person dies intestate.

Where there is a Will: Where there is a Spouse and no issue, the Spouse is entitled to one-half of the estate, irrespective of the provisions of the Will.

Where there is a surviving Spouse and children, the Spouse is entitled to one-third of the estate, irrespective of the provisions of the Will.

Where there is a Spouse and grandchildren or other remoter issue, but no immediate children, the Spouse is entitled to one-half of the estate, irrespective of the provisions of the Will.

Where there is no Will: Where there is a Spouse but no children, the Spouse is entitled to the whole estate.

Where there is a Spouse with children, the Spouse is entitled to take two-thirds of the estate, similarly where there is a Spouse and grandchildren or other remoter issue, the Spouse is entitled to two-thirds of the estate.

#### 8. **Section 117 of the Succession Act 1965**

This Section deals with provision for the children of the Testator. An action may be taken by a child of the testator where the Testator fails in their moral duty to make proper provision under the Will or otherwise. To succeed, they must establish to the satisfaction of the Court that a Testator has failed in their moral duty to make proper provision for them out of the estate. Court will consider whether in all the circumstances the Testator was required to make greater provision for one of his children than for others. There is no obligation on a Testator to divide the estate equally.

#### 9. **What is Probate?**

Probate is a grant of representation issued from the Probate Office, or from a District Probate Registry, both of which are part of the High Court, to the effect that the Will of the Testator has been proved and registered in court and that the administration of his effects has been granted to the Executor proving the Will. On death the estate passes to the Executor to hold in trust for the beneficiaries. To legally carry out his function the Executor must take out a Grant of Probate in the High Court. If there is no executor then the property vests in the President of the High Court until the grant of letters of Administration. The Executor/Administrator must firstly pay funeral, testamentary and administration expenses, debts and taxes before transferring property to those entitled under Will or Intestate succession. An application for a Grant of Probate or Letters of Administration may be made to the Probate Office or the District Registry within whose district the deceased had a fixed place of abode at the time of death.

#### 10. **What About Inheritance Tax?**

Inheritance tax means a tax payable on all property contained in the inheritance or gift made by a Testator/Intestate (disponer). Inheritance tax is computed on the basis of class thresholds and the value of the threshold depends on the degree of the relationship between the disponer and the successor.

<b>Class</b>	<b>Relationship to Disponer</b>
Class A - €422,148	Parent, child, or a grandchild under 18 years of age and whose parent is dead, foster child or an adopted child of a natural parent
Class B - € 42,215	Brother, sister or a child of a brother or sister
Class C - € 21, 108	Not entitled under Class A or B

Groups A,B and C may be reached by a single inheritance or by a number of inheritances spread over a number of years. Spouses and inheritances for public or charitable purposes are exempt from inheritance tax. There are also provisions for preferential treatment of a nephew or niece and for certain exemptions on a dwelling house where occupation can be proved.

11. **Revocation of a Will**

Section 85 of the Succession Act 1965 deals with the revoking of a Will. Where a single person has made a Will, the subsequent marriage of that person shall revoke the Will; unless the Will was made in contemplation of that marriage. A Will can also be revoked by another newer Will, some writing declaring an intention to revoke the Will and executed in the manner in which a Will is required to be executed; by the burning, tearing or destruction of the Will with the intention of revoking it or by a codicil (an instrument executed by a Testator for adding to, altering, explaining or confirming a Will previously made by the Testator).

12. **Personal Affairs Checklist**

It is essential that you maintain a concise record of your personal affairs and papers. This should at a minimum contain details concerning the location of your Will and your financial affairs details. Other general information such as membership of clubs, employment record, etc, should also be included. The CAOGA Personal Affairs Checklist is a very comprehensive document that is well worth completing and notifying its location to your Executors.

## REQUIREMENTS OF A VALID WILL

13. **A Will Must Be in Writing**

The requirement that a valid Will must be in writing, set down in Section 78 of the Succession Act 1965, has been given a broad interpretation by the Courts. In general, provided the Will is conclusive of the Testator's final testamentary intentions, the Will can be admissible to probate irrespective of the form of the writing, the language used by the Testator, and any alternative title employed by the Testator. A Will may be typed, or in the Testator's own handwriting.

14. **Signed at the end by the Testator**

The Courts adopt a broad interpretation of a Testator's signature when considering the validity of a Will. In the past, the requirement of a Testator's signature has been satisfied where the Testator only used his initials; where the Testator used an assumed name or where the signature was by way of a stamp or seal. Where a Testator is incapable of writing, due to physical infirmity, an illegible mark in the appropriate place on a Will (with or without a guiding help from another) could constitute a valid signature. To satisfy the requirement of a valid signature, the Court must be satisfied that the mark made by the Testator is

intended to be his signature.

The essential requirement is that a signature must come at the foot or end of the Will. The Courts adopt a strict interpretation to ensure the authenticity of the foregoing testamentary provisions and to prevent any fraudulent additions to the Will post signature. Section 78(3) of the Succession Act 1965 states that a signature "is sufficient if the signature is so placed at or after, or following, or under, or beside, or opposite to the end of the Will that it is apparent on the face of the Will that the Testator intended to give effect by the signature to the writing signed as his Will". Subsection 4 continues by stating that the following circumstances shall not affect the validity of the signature: (a) where the signature does not immediately follow the Will; (b) where there is a blank space between the last word of the Will and the signature; (c) where the signature is placed among the attestation clause or the testimonium clause; (d) where the signature is on a side or page or other portion of the paper or papers containing the Will where nom clause or paragraph is written above the signature; (e) where there appears to be sufficient space at the bottom of the preceding page of the Will. Most importantly, subsection (5) states that "a signature shall not be operative to give effect to any disposition or direction inserted after the signature".

15. **Testator's Signature to be in the Presence of Two Witnesses Present at the Same Time**

Usually a court will be satisfied that this requirement has been fulfilled where the two witnesses were in close physical proximity to the Testator at the time of signing the Will. Even in the absence of physical proximity, the requirement has been satisfied in the past where the witnesses had a "line of sight" of the Testator at the relevant time.

Although it is preferable that the witnesses sign their names near where the Testator has signed the Will, the fact that they are not in close proximity should not affect the validity of the Will provided that the signature is made with the purpose of attesting the Testator's signature. While Section 78 does not impose a requirement to do so, it is the practice to include an attestation clause which will give rise to the presumption in law that the Will was duly executed.

16. **Will not void on account of Incompetent Witnesses**

There is no provision in the Succession Act 1965 which requires a witness to be of a certain age or level of intellectual capacity before the attestation will be valid. The only requirement of competency required by the courts is that the witness is not blind, a requirement motivated by the very purpose of attestation itself, i.e. that the witness has seen the Testator sign his name. Other common sense qualifications of this rule includes that the witness must be conscious at the time the Testator signed the Will.

17. **Gifts to Attesting Witnesses or Spouse Void**

For public policy reasons and to prevent the exercise of undue influence on a Testator, Section 82 of the Succession Act 1965 states that where a person attests the execution of a Will and also stands to benefit from a devise, bequest

or appointment from the Will then this devise, bequest or appointment shall be "utterly null and void". This rule also extends to where it is the witness's spouse who is the donee of the bequest. This rule will not apply where the beneficiary does not take the gift beneficially and merely holds it on trust for another.

18. **Executor may witness Will (but may invalidate charging clause)**

Section 84 of the Succession Act 1965 states that the validity of an attestation shall not be affected merely because one of the witnesses is also an executor. An executor's attestation may, however, effect the charging clause in a Will; i.e. the clause in a Will which provides that a professional executor, such as a solicitor, may charge and be paid for his services. Given that this charging clause is treated as a gift, the terms of section 82 may apply. Thus if a solicitor, or his spouse, attests a Will the solicitor is not permitted to receive any payment for his services apart from mere out-of-pocket expenses.

19. **Subsequent Marriage of Testator revokes a Will unless made in contemplation of specific marriage**

The policy consideration inherent in this rule is the assumption that once a person enters marriage they take assume obligations which should take precedence over any prior dispositions of their property. The revocation of a pre-marriage Will ensures that the Testator's new family will be entitled to the rules of intestacy at the very least.

**SOLICITOR:**

The Society's solicitor is Baynes & Co- Solicitors, 77 Benburb Street, Dublin 7. Michael Baynes is a retired Army Captain who served mainly in the West Command as it was known then and is very helpful to the Society regarding family matters, etc. Michael can give advice to any of our members on making out a Will, naturally for a modest fee. Michael can be contacted at the above address in Dublin or by phone/fax at the following: Phone: 01 6712384. Fax: 6712386.