

Wills and Probate



Emma Fogarty
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Inheritance and family farms

“It’s my field. It’s my child. I nursed it. I nourished it. I saw to its every want. I dug the rocks out of it with my bare hands and I made a living thing of it! My only want is that green grass, that lovely green grass, and you want to take it away from me, and in the sight of God I can’t let you do that!”

The Bull McCabe in John B Keane’s
“The Field”



Importance of making a Will

- Allows for succession planning.
- Tax planning.
- Honours intentions of Testator.
- Specific bequests can be made.
- Proper division amongst family members.
- Level of certainty on death.



Requirements for valid Will

- Set out in Succession Act 1965.
- Testator must be 18 years old & of sound disposing mind.
- Will must be in writing.
- Signed at end by Testator / some person in his presence or by his direction.
- In presence of 2 witnesses (not beneficiaries) who sign in presence of Testator.
- Testator must act independently & not be influenced by anyone.
- Keep it clear and simple.

Content/ Format of Will

- Renunciation of previous Wills.
- Appoint Executors.
- Direction that all debts/ liabilities be paid out of estate.
- If you have children under 18, appoint Guardians.
- Creation of trust – appoint Trustees.
- Specific bequests – clear and unambiguous.
- Residue clause is important and captures everything not dealt with in Will.
- Note - BPS payments transfer with land after 21st November 2017.

Tax Issues

- ❑ Importance of professional tax advice.

- ❑ CAT/ Inheritance tax thresholds:
 - Spouse – no tax
 - Group A (child, foster child, minor child of deceased child) - **€335,000**
 - Group B (lineal relation eg brother, sister, niece, nephew) - **€32,500**
 - Group C (others) - **€16,250**
 - Tax payable at 33% on excess of value above threshold.
 - Annual small gift exemption = €3,000 per individual.

Limits on testamentary freedom

- ❑ Testator can decide what to do with assets within constraints of law.
- ❑ Statutory entitlements of certain persons under Succession Act.
- ❑ Spouse, no children – spouse has right to 1/2 of estate (legal right share).
- ❑ Spouse & children – spouse has right to 1/3 of estate.
- ❑ Spouse may elect to take bequest or legal right share.
- ❑ Right of surviving spouse to appropriate dwelling house.

Possible challenges to a Will

- Incorrect execution / format – eg case in Wexford where Will was forged.
- Capacity of Testator.
- Duress / Undue Influence – Testator must act independently.
- Legal right share.
- Challenge by child under s.117 of Succession Act.

S.117 Actions against Estate

- No legal obligation to leave anything to child.
- Failure of Testator in moral duty to make proper provision for child.
- “Child” includes unborn and adopted children.
- Step-children cannot challenge will.
- Advancement to child during lifetime taken into account, eg site transfer.

- Will may also be challenged by child on basis of promissory estoppel.

Rules of Intestacy

- Spouse, no issue – all of estate.
- Spouse plus issue – spouse takes 2/3 and issue takes 1/3.
- No spouse but issue – divided equally amongst issue.
- No spouse or issue – parents in equal shares.
- No spouse, issue or parents – siblings in equal shares, then nieces & nephews.
- None of above – divided equally among next-of-kin.
- No next-of-kin – goes to State.
- Consequences - possible tax issues, rows and legal disputes.

Rights of Cohabitants

- ❑ **Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.**
- ❑ Prior to 2010, couples who lived together had no rights.
- ❑ Act gives inheritance rights to cohabitants.
- ❑ “Cohabitant” = one of 2 adults living together as couple in intimate & committed relationship, not related to each other or married or civil partners.
- ❑ “Qualified cohabitant” – 2 years where children, 5 years where no children.
- ❑ Application to court for provision out of net estate must be made.
- ❑ Relevant factors = Duration of relationship? Financial independence? Dependent children?

Pre-nuptial Agreements

- ❑ Parents may have concerns over child's partner/ spouse.
- ❑ Making a PNA before marriage is becoming more common in farming families.
- ❑ Not legally enforceable in Ireland as contrary to Constitution.
- ❑ Persuasive value for court in judicial separation or divorce.
- ❑ Landmark case in UK – PNA was upheld & guiding principles set out by court.
- ❑ Farming organisations in Ireland have called for recognition of PNAs.

Administration of the Estate

- Will – **Executor** takes out “**Grant of Probate**”.
- No Will – **Administrator** takes out “**Letters of Administration Intestate**”.
- Death Certificate, PPS number, DOB of deceased person required.
- Valuation of lands, stock, machinery etc.
- Beneficiaries’ details – PPS no’s, addresses, previous gifts/inheritances.
- Complete Schedule of Assets & lodge in Probate Office.
- Debts and liabilities – discharged out of estate.

Enduring Power of Attorney (EPA)

- Gives certain powers to those appointed as Attorneys – EPA can be limited.
- EPA only becomes active if you become mentally incapacitated.
- Attorneys can make important decisions & act in legal, financial and medical matters.
- Allows family members to access funds to deal with costs of care.
- No EPA – apply to High Court to have person made Ward of Court.

- Assisted Decision-Making (Capacity) Act 2015** – modern statutory framework to support decision-making by adults with capacity difficulties – expected to commence June 2022.

Other important matters

- Round table discussion with family – it's never too early to start planning.
- Prepare list of assets – property held jointly transfers by survivorship.
- Needs/ requirements of children – consider previous gifts.
- Your own & spouse's needs into future – financial security in retirement.
- Marriage automatically revokes Will BUT **divorce does not**.
- Will “speaks from death” - should be reviewed regularly.
- Let family member/ close friend (not your solicitor) know your wishes on death.

Finally...

- For successful succession to take place, you need to:
 - start the conversation
 - identify successor(s)
 - decide best structure to bring in successor(s)
 - decide how to look after other family members
 - ensure you look after yourself and your spouse
 - identify executors and inform them of decision to appoint them
 - talk to advisor, solicitor, accountant to implement succession plan

- Minimise tax and avoid legal & family disputes on your death.

Thank you!



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