



St John's
CHAMBERS

Speaking from beyond the grave

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Death is a taboo subject. It is not generally discussed in polite conversation and to contemplate one's own is not usually considered healthy or productive. All the evidence does however suggest it is inevitable and most people understand that some advanced planning is essential. Everybody knows they should have a Will, particularly if they have dependents, or at least consider whether they need one. It is however a task that is easily put off, it is also an intensely private matter and not an easy thing to discuss even with close relatives.

What is a Will? It might seem obvious, but a Will is a document that takes effect in law upon a person's death. It is an authority given by the deceased to trusted persons to deal with his or her property, usually in its entirety, in accordance with the instructions recorded in the Will. Those persons are then required by law to execute the deceased's intentions and are therefore described as the executors of the deceased's Will.

For obvious reasons the instructions contained in a Will must be sufficiently certain for the executors to be in no doubt as to what they are required to do, as there is obviously no opportunity to check what was intended. Wills are therefore drafted in precise language often using phrases that have a very well understood meaning in law having been refined over decades, if not centuries, to embody well understood concepts.

Given the importance of a Will, which deals with the final disposition of a person's entire property accumulated over a lifetime, the law requires a person to evidence their intentions

in writing with due formality, to make a testament. A Will must be signed at the end by the testator, or if he is unable to do so by someone else on their behalf in their presence, and signed or acknowledged in the presence of two or more witnesses.

Most importantly it must be a record of the person's free will. This does not usually cause any difficulty. Where the Will has been drafted by a solicitor from instructions given by the testator personally and the draft Will is properly explained and read over to the testator by the solicitor before it is formally signed and witnessed, then there is a strong presumption that the Will represents the testator's true will. In the vast majority of cases a Will can be proved after death, which is necessary for the executors to be able to legally deal with the estate, by an administrative procedure (the executors swear an oath and pay any sum required on account of Inheritance Tax) and nobody challenges the "grant of probate".

Free will is however a troublesome concept, it requires the independent exercise of a mind sufficiently sound to at least understand the extent that person's property and the claims on them. It must be free from undue influence and pressure. The court's will therefore not allow a will to be proved before a court, if there is any real suspicion that the will is not a true record of a person's intentions, but equally will be slow to interfere with what on its face appears to be a properly executed Will.

Every Englishman, and Englishwoman, by and large remains at liberty at his death to dispose of his own property in whatever way he pleases. This is in distinction to other systems where the law or religion may require property to devolve in a particular manner. The limited exception is if the deceased has failed to make reasonable provision for their partner or other dependant, in which case the court's may intervene on an application under the Inheritance (Provision for Family and Dependents) Act 1975.

Unfortunately, no doubt partly because of such freedom, there are always before the courts a number of bitter disputes over Wills. Money and death have throughout the ages brought out the worst in people. As Lord Neuberger the current Master of the Rolls said in

a recent case "people's wishes can be unexpected, inexplicable, unfair, and even improper". Lord Walker, a member of the Supreme Court, said in another that it "is notorious that some elderly persons of means derive enjoyment from the possession of testamentary power, and from dropping hints as to their intentions". People can also become vulnerable to improper pressure and influence as they get older and weaker, in body and in mind. They can form irrational delusions about those close to them. Sibling rivalry often comes to the fore in relation to estates, both before and after death. As Lord Neuberger went on to say in the same case "Wills frequently give rise to feelings of disappointment or worse on the part of relatives and would-be beneficiaries. Human nature being what it is, such people will often be able to find evidence, or to persuade themselves that evidence exists, which shows that the will did not, could not, or was unlikely to represent the intention of the testatrix [or testator], or that the testatrix [or testator] was in some way mentally affected so as to cast doubt on the will." If parents are not careful, a lifetime of nurturing a close family can be blown apart by an ill-considered exercise of testamentary power.

Any such problems can hopefully be avoided by confronting the taboo in good time, executing a properly drawn Will and discussing testamentary intentions with close family members. By doing so timely consideration can be given to any necessary tax planning, which will in any event usually give consideration to what lifetime dispositions should be made.

If one does not have a Will, then the statutory rules on an intestacy apply, which may not be appropriate in the circumstances of one's death, possibly unexpected. There is no opportunity to explain one's intentions either in the Will or privately to one's executors. This is of particular importance for someone who has complex property interests, which are personally managed by them, especially someone with their own business. A will is essential so that plans can be made for the orderly, and tax efficient, management of one's affairs by trusted persons, for example in the case of a business whether by passing it to

the next generation, winding it up or by sale as a going concern. It is almost inevitable in such circumstances that executors will require detailed instructions and it will often be sensible to appoint a professional executor.

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