Frequently Asked Questions

In today's busy and more complicated world, making a Will as part of your planning has never been so important.

Greater wealth and more complex family arrangements can mean at a time when the family should be mourning a loss loved ones are having to concentrate on sorting out matters that could have been dealt with in advance.

We hope you will find the answers to your questions, but if not please contact us by email on michael@mihwills.co.uk

EXECUTORS/TRUSTEES/GUARDIANS - GIFTS/LEGACIES - IHT

WITNESSING - TRUSTEE POWERS

MENTAL CAPACITY - Banks -v- Goodfellow Test for Mental Capacity

DEFENDING THE ASSETS – RESIDENTIAL CARE FEES

The National Health Service and Community Care Act 1990 came into force on the 1st April 1993. Ever since then anyone in full time residential care and who have sufficient assets, but modest incomes, have been forced to seek ways of disposing of their property to put it beyond the reach of local authority care fees assessment.

Below is the current table of costs associated with care fees in England.

Amount of capital you have if you live in England **(these figures will vary slightly if you live in Wales, Scotland or NI)**	**How your capital is used to calculate your contribution to your care home fees**
Over £23,250	You will be assessed as being able to meet the full cost of your care
Between £14,250 and £23,250	Capital between these amounts will be calculated as providing you with an income of £1 per week for every £250 of your savings
£14,250 or under	Your capital will be ignored in calculating how much you have to contribute to the

Q. My wife and I signed over our house to our four children seven years ago. If either she or I have to go into a care home, will our children be forced to pay anything towards the fees?

The local authority will calculate the amount payable on the capital you have at the time you are taken into care. Your capital will include any buildings, land, shares and savings. If it adds up to more than £23,250 (£22,000 in Wales and £22,750 in Scotland) you will have to contribute towards the cost of your care. However, the local authority has the right to look at any assets you have given away and if it decides this was done to avoid future care fees, it can assess you as if you still owned the capital. If you gave your home to your children for another good reason, or at a time when you were fit and healthy and could not have foreseen the need to move into residential care, it is possible the local authority will not take any action.

WARNING: the seven year rule only applies to estates that under the Nil Rate band (currently £325,000 per person), if the joint estates are in excess of the £650,000 (two nil rate bands) there will still be a charge to inheritance tax on the excess sum at 40%. The seven year rule only applies to inheritance tax and HMRC; the local authority can look back as many years as they want to see what assets the person in care owned and how and why they disposed of them.

If it can be shown that you have deliberately disposed of assets to avoid paying for care fees then the assets can be reclaimed by the authority to pay for any care fees due.

Q We own our home in joint names?
Most couples when they buy their home on a mortgage find they own the property as ‘joint tenants’. The up-side to this is that the property will pass to the survivor by ‘automatic survivorship’ regardless of individual circumstances and need, and irrespective of what each will may state.

The down-side is that it is impossible to plan for individual deaths, even via a Will, due to this survivorship situation.

This would be particularly important to know in a situation where a couple have been married or in a relationship before and have children of that relationship that they would want to benefit from their share and interest in their property.

To get around this, you need to consider ‘severing’ the joint tenancy (or ownership) to what is called ‘tenants in common’. This will ensure that you both hold your share of the family home in specific shares and as such you can ‘will’ your share to your children or other beneficiaries as you wish. The Will should also contain a simple but effective property trust, commonly called a Protective Property Trust, which guarantees that the survivor will have the security of being

able to remain in the property and have full use of it but that the deceased's share remains in the trust until the trust ends.

EXECUTORS, TRUSTEES AND GUARDIANS

Q. Can my Beneficiaries be my Executors?
Yes they can if you want them to. Today it is often common that those who will get the estate have a role to play in the organising of the estate before it is given.
What's the difference between an Executor and a Trustee?
In most estates today, it is common to appoint the Executors as Trustees. The main difference is that trustee is the person responsible for making the decisions that maintain the estate whilst it is held on trust before it is given to the beneficiaries, and the executor is the person that carries out (or executes) the actions and wishes of the Trustees during this time.

Q. Do I have to appoint a Solicitor or Bank as my Trustees?
No; you can appoint anyone you like. It is likely however, that when your estate is going through Probate that you will in some part require some professional assistance. Our advice is to choose people you absolutely trust and ensure that the Will includes a statement that empowers them to employ any professionals that have not already been nominated. The Society and many of our Members do offer probate and executorship services. Contact the Society for details of a probate specialist in your area.

Q. Does it matter if my Executors live abroad?
No, although it is always prudent to have some executors in the country in which you are residing.

Q. How many Executors can I choose?
You can have as many Executors as you like, but the Law only allows a maximum of four to act at the same time.

Q. What does an Executor have to do?
It is difficult to go into great detail here, but the main role of an Executor is to carry out the wishes of the testator's estate.

Q. Should my Guardians be Executors?
It is very common for the guardians to be executors. It normally follows that if you trust someone to take care of your children, then they should have some form of access to the assets of the estate to provide for your children. It should also be mentioned that there are some instances where the Guardian (e.g. a divorced parent) should not be allowed direct access to the assets, but go through an alternative Executor.

GIFTS AND LEGACIES

Q. Do I have to list everything that I own in my Will?
No, Wills are not shopping lists. If you want specific objects, collections or even amounts of money to go to particular people, then yes you should list these. However, what you do not identify in your estate (everything else not listed - whatever it is) is dealt with through distribution of your Residue.

Q. Do Gifts and Legacies have to be under a certain value?
Not at all, a gift can be any value you like (e.g. £10,000 or your house etc.)

Q. Can I gift to charities?
Yes, but we need to know the full Name, address and Registered number of the charity. All gifts to charities are tax free - so they can be used to reduce any Inheritance Tax liability.

Q. Can I set age limits when gifts can be received?
Yes, this is what Trustees are for - to see that the gifts you leave are preserved as best as possible until they should be given at the time or age you have specified.

TAX DATA

Inheritance Tax

£325,000
RATE OF TAX ON BALANCE: Chargeable lifetime transfers - 20% Transfers on or within 7 years of death - 40%

All lifetime transfers not covered by exemptions and made within seven years of death will be added back into the estate for the purpose of calculating the tax payable at the rate at death. This may then be reduced by taper relief.

Charge on Gifts Within 7 Years of Death

Years before death 0-3 3-4 4-5 5-6 6-7
% of charge 100 80 60 40 20

Main Exemptions

Most transfers between husband and wife
The first £3000 of lifetime transfers in any tax year (husband and wife each have their own exemption)
Gifts of up but not exceeding £250 p.a. to any number of persons
Gifts made out of income that form part of normal expenditure and do not reduce

the standard of living
Gifts in consideration of marriage to bride and/or groom as follows: up to £5000 by a parent, £2500 by a grandparent or £1000 by any other person
Gifts to charities whether made during lifetime or on death

TRUST TO BEAT IHT

Q. My husband and I leave everything to each other in our Wills, but if we die at the same time everything goes to out two small children. My concern is that our joint assets plus life insurance would result in a hefty inheritance tax bill for them. How can we avoid this?
The situation before October 9 2007 meant that you and your husband having reciprocal Wills (commonly called mirror Wills), which means that when one of you dies, everything you own passes to the other. The first £325,000 of each of your estates, known as the nil-rate band, is free of tax. However, transfers between husband and wife are exempt from IHT, which means that the nil-rate band on first death is wasted. The easiest way to reduce a potential IHT bill is to ensure that both of you use your nil-rate bands by creating a discretionary trust in your Wills. The survivor can be one of the beneficiaries and receive income or capital from the trust. To make this effective, you should each have personal rather than jointly held assets. You should also ensure that any life assurance policies are written into trust for your family. This way the proceeds can bypass your estate.

The situation now with regard for tax mitigation within a Will has changed over the past few years with the introduction of the ‘transferrable nil rate band’. Pre October 9 2007, the nil rate band was an individual allowance, and was lost if you failed to make a Will as any unused portion could not be used by the surviving spouse on their death.

October 2007 saw the introduction of the transferrable nil rate band, so for the first time a on the death of the surviving spouse (or civil partner) their executors could apply any unused portions of their spouses nil rate band towards any tax liability.

The transferrable nil rate band is only available to married couples and couples who have entered into a civil partnership.

THE FAMILY HOME

Q. My daughter and her fiancé bought a bungalow together about a year ago. They split everything down the middle from the mortgage to the outgoings. But he has now made a Will leaving half the bungalow to his daughter from a previous marriage. I have two questions: As her fiancé, can he do this? And once they are married, does his Will, including the gift

of his share of the bungalow - become invalid?

You say they split everything down the middle, but you do not say on what basis they co-own the bungalow. In legal terms, are they 'joint tenants' or 'tenants in common'? The difference is crucial. If they are joint tenants, they both own the whole property, not merely an individual share. When one dies the survivor automatically inherits the deceased's share and becomes the sole owner. So, if they are joint tenants the answer to the first part of the question is, no, he can't do that. Your daughter's fiancé cannot make a valid Will leaving half the bungalow to his daughter - or to anyone else, simply because he is a joint tenant. However if they are tenants in common he could make a Will dealing with his own share in the property. As a tenant in common, he owns only that specific share - not necessarily one half - and he can dispose of it in any way he thinks fit. Tenants in common is a much more flexible way of holding property than joint tenants. As to the second question, the subsequent marriage will make the current Will invalid, unless it has been written in expectation or contemplation of marriage.

GUARDIANS

Q. Should my Guardians be Executors?
It is very common for the guardians to be executors. It normally follows that if you trust someone to take care of your children, then they should have some form of access to the assets of the estate to provide for your children. It should also be mentioned that there are some instances where the Guardian (e.g. a divorced parent) should not be allowed direct access to the assets, but go through an alternative Executor.

Q. Who can automatically become a Guardian?
Only a parent of the child or children who has 'parental responsibility'. This means that unless the father is married to the mother or has 'obtained' parental responsibility have a right to appoint Guardians. If you make a Will 'Parental Responsibility' can be given through appointment of Guardianship to the birth father.

Q. My partner and I are not married but have two children between us. How can he get parental responsibility?
As was stated above, the mother can name the father in her Will as one way. The other straightforward ways for the natural father to obtain parental responsibility are:

The father marrying the mother;
The father being named on the birth certificate if registered after December 2003;

Completing a Parental Responsibility Agreement for each child in conjunction with the birth mother;
By application to the court

MENTAL CAPACITY - The Banks -v- Goodfellow Test

The classic exposition of the degree of mental competence required to make a Will in English law is contained in Banks v Goodfellow (1870):
....As to the testator's capacity, he must, in the language of the law, have a sound and disposing mind and memory. In other words, he ought to be capable of making his Will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, and of the persons who are the object of his bounty, and the manner in which it is to be distributed between them. It is not necessary that he should view his Will with eye of a lawyer, and comprehend its provisions in their legal form. It is sufficient if he has such a mind and memory as will enable him to understand the elements of which it is composed, and the disposition of his property in its simple forms. In deciding upon the capacity of the testator to make his Will, it is the soundness of the mind, and not the particular state of the bodily health, that is to be attended to; the latter may in a state of extreme imbecility, and yet he may possess sufficient understanding to direct how his property shall be disposed of; his capacity may be perfect to dispose of his property by Will, and yet very inadequate to the management of other business, as, for instance, to make contracts for the purchase or sale of property.

The Banks v Goodfellow test is a working guide: no test could be expected to do more in as complicated an area as that of the functioning of the human mind. It appears that the Banks-competent testator must possess a 'sound and disposing mind and memory'. That requires four criteria to be satisfied:

(a) 'nature of the business': the testator must understand 'the nature of the business in which he is engaged'. Thus he must be aware that he is engaged in a testamentary act, i.e. expressing wishes - normally concerning the disposition of property - that will take effect on his death. it is a broad understanding that is required of the testator: he need not view the Will 'with the eye of a lawyer'.

(b) 'recollection of the property': the testator must have a recollection of the property he means to dispose of'. Again, it is a general awareness that is required: the testator need not recollect every item of his property. In Waters v Waters (1848), a case concerning the lengthy Will of a wealthy but illiterate testator, Colerage J stated that a 'specific and accurate knowledge of every atom of his property' was not required of the testator but that 'he ought to know generally the state of his property and what it consists of'. The required level of recollection will depend on the circumstances: a testator with extensive property assets may be expected to have the awareness appropriate to the amount of property that he owns.

(c) 'the objects of his bounty': the testator must recollect 'the persons who are the objects of his bounty'. Thus the testator must at least be aware of the existence of persons who might be considered to have a moral claim on his estate - whether friends or relatives - even if he chooses not to benefit them. In Harwood v Baker (1840), the testator appears to have suffered a stroke after visiting the Bank of England. A few days later he executed a Will shortly before he died in which he left all his property to his wife, thus excluding a number of relatives. The Will was held to be invalid because the testator, in the opinion of the court, was too ill to give sufficient consideration to the potential claims of his relatives. Erskine J stated that the question before the court was whether the testator was capable of recollecting who were his relatives, of understanding 'their respective claims upon his regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share of his property'. The case is not authority, however, for saying that testators must engage in careful exercise of recollecting all their relatives and friends in order to make a valid Will.

(d) 'manner of distribution': the testator must have the recollection of 'the manner' in which the property is to be distributed between 'the objects of his bounty'. It is not altogether clear what 'manner' comprises, but most probably it refers to the division of the testator’s estate: he must be broadly aware of how he has shared out his estate. That may require an understanding of the closeness of his ties with potential beneficiaries and the nature of their claims: Boughton v Knight (1873): in that case Hannan J stated that apart from the need to recall 'fitting objects of the testators bounty' a testator had to have 'an understanding to comprehend their relationship to himself and their claim upon him'.

Medical science has advanced considerably since the time when Banks v Goodfellow was decided, especially in the field of mental health. Although it is questionable to what extent the test put forward in the case is medically sound, the courts continue to regard the test as the indicator of the level of mental competence required. In Wood v Wood (1992), the testator made a Will two days before he died. He was aged 82 and had been transferred to hospital following a serious accident in his home. There was compelling evidence - especially from a solicitor who had visited the testator shortly before the latter died - that the testator was confused and incoherent. The court held that the onus of establishing testamentary capacity had not been discharged: there was insufficient evidence that the testator was able to comprehend the extent of his property or the nature of the claims of those he was excluding. On the other hand, not every form of mental illness will be fatal to testamentary capacity, as Banks v Goodfellow made clear. For example, in Brown v Pourau (1995), the testatrix's Will was upheld even though she was occasionally subject to trances in which, believing that a Maori curse had been placed on her, she talked to 'the spirits' and 'the fairies'.

Whether a testator is Banks-competent may depend on the level of complexity of

the Will. Consider In the Estate of Park (1953) where the testator was aged 78 and in very poor health. He had been seriously affected by two strokes so that he was unable to look after his financial affairs - he had previously been a successful businessman - and became forgetful and occasionally confused. Eventually he decided that he wanted to marry the cashier at his club, whom he scarcely knew. When he informed his chauffeur of his intentions the latter responded: 'well, I don't think you even know the lady yet, sir,' But the testator was not to be discouraged and three weeks later the couple married at Kensington register office. The testator executed a new Will at the reception following the wedding - an unusual form of diversion at such gatherings. He died some days later. The Will, a complicated one, was held to be invalid on the grounds of lack of mental competence (although the marriage was upheld). The Court of Appeal drew a distinction between simple and complicated wills, implying that the mental competence required would differ accordingly.

The Banks v Goodfellow has now largely been replicated by the introduction of the Mental Capacity Act 2005 and you can read more on the Act at the Office of Public Guardian web site.