A battle of Wills -v- Intestacy

Estate Planning is not a luxury, but a necessity which many people ignore. We cannot know when we might die, but we can ensure that should it be sooner than we think, our affairs are in order and our loved ones are spared further distress, uncertainty and hardship.

It is so important to have a current, valid Will. Should you die without having made a Will, your estate is "intestate" and the way in which your assets are distributed is determined by State legislation and may not accord with your wishes or be the most appropriate and efficient way of dealing with your assets, the needs of your loved ones and other considerations such as taxation.

Intestacy (dying without a Will)

The distribution of an intestate's estate is governed by the *Administration and Probate Act 1958*. The Act sets out a scheme of distribution which is determined by the relatives left by the deceased:-

- If the deceased leaves a spouse or domestic partner and no children then the entire estate will go to the spouse or domestic partner.
- However, if the deceased leaves a spouse or domestic partner *and* children, then the estate is divided between the spouse/domestic partner and children in proportions set out in the legislation. Problems can arise for example in the case of second marriages where there are adult children from a previous relationship.
- If there happens to be a spouse *and* a domestic partner, for example after the breakdown of a marriage but prior to a decree of divorce, yet more provisions dictate how the estate is to be shared between the spouse and domestic partner. Throw children into the mix and it gets more complicated still.
- If there is no spouse/domestic partner or children then the parents, siblings or remoter relatives of the deceased benefit from the estate, and if no living relative can be located, then the Government will receive the assets of the estate.

The person who will be authorised by the Court to take responsibility for the distribution of an intestate's estate will generally be the person with the greatest entitlement to the assets of the estate.

What are the advantages of having a Will?

Clearly, the statutory framework for the distribution of an intestate's estate will not always accord with how you would wish your estate to be distributed. Even if it does, there are many reasons why it is preferable to have a Will:-

- You can choose who you wish to deal with the administration of your estate. This may be a trusted friend, professional adviser, relative or a combination.
- You can decide and set out how you wish your estate to be distributed. There may be particular items which you wish to go to specified people. You may wish your

spouse to benefit from the whole of your estate, even though you have children. You may wish to leave something to a charity.

- You can structure your estate in a way which can take care of a current spouse, while ensuring that children from a previous relationship will ultimately benefit from your estate.

- Through the use of Testamentary Discretionary Trusts, you can enable your beneficiaries to take advantage of significant tax savings and asset protection advantages.

What is involved in making a Will?

A valid Will must comply with the formal requirements of the *Wills Act 1997*.

You will need to give thought to how you want your estate to be distributed and to whom you wish to entrust the management of your estate.

Choosing to have a lawyer experienced in the preparation of Wills and the administration of estates, means that you get good, sound advice about your own particular circumstances and the most appropriate way to maximise the benefits for your loved ones, and minimise the potential problems or hardships.

Can a Will be disputed?

Yes. There are basically two types of challenge that can be brought against a Will. The first is that the Will is not valid, for example due to a lack of capacity of the person making the Will, undue influence or the formal requirements not having been met. The second is where a person for whom the deceased had responsibility to provide claims that the Will fails to make adequate provision for them. The chances of a successful challenge will depend upon all the circumstances, but the likelihood of a challenge can be reduced if appropriate advice is sought and provided at the time of making a Will.

How often should a Will be reviewed?

Wills should always be reviewed in the following circumstances:-

- Marriage or Divorce
- De Facto relationship
- Birth of children

In the absence of any life-changing change in circumstances, Wills should be reviewed not less than every five years.