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DRAFTING A WILL
5 COMMON MISTAKES

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WHY MAKE A WILL ?

A Will is a legal document in which the person making the Will, otherwise known as the Testator, expresses his or her wishes as to how his or her property and assets will be passed on or shared after his or her death.

Making a Will brings clarity to your intentions, for your assets and valuables, that you have created during your lifetime. If you don't make a Will then your wishes or intentions cannot be carried out regardless of whether or not you have orally told people what you would want after you die.

In the absence of a Will the Succession Act of 1965 provides the rules as to how your estate and your assets will be divided after your death. This may be very different to what your wishes and intentions are but the Law has to make the best provision in the most fair and equitable way that it would see fit to divide your assets amongst your next of kin. Therefore if you do not state clearly in writing in a Will exactly what your wishes are, and what exactly you want to go to whom after you die, then those intentions cannot be carried out.

If you die without a Will your assets will be distributed according to the Rules of Intestacy.

The importance of making a Will cannot be emphasized enough. Creating a Will that has a mistake in it or making a Will that is not written according to the very strict rules that pertain to creating a Will or a homemade Will made by someone not understanding the ways in which a Will can be invalidated can all have devastating outcomes.

The following are five common mistakes that are made in making a Will and you must remember that a badly drafted Will or a homemade Will that can be challenged and overturned can result in the same situation as having no Will at all.

1. Vague Descriptions.

A common mistake with Wills is often that the description of what asset is to go to whom is too vague. People making Wills often forget the importance of not describing the assets specifically, particularly if its land and its specific location and whom they may wish it to go to. Stating that you wish an asset to go to your nephew Brendan not identifying Brendan by his full name or address can cause difficulties particularly if there are several Brendan's in the family or indeed several nephews or relations called Brendan.

If you are completing your Will, you know who the person is that you wish to get your asset, however the interpretation or the way in which a Will is read is very important. You will not be around when your Will is being read and therefore any notes, anything said at the time that you were completing your Will maybe taken into Account but may not override the way in which the Will is construed if it's not clear or specific.

A costly court case over an asset that has not been described in full or the beneficiary that you mean to get not described sufficiently it is not something that you would wish to take place. If you are leaving your house to a person do you intend to leave the contents to that same person? Are there specific contents that you would wish to leave to another person? The devil is in the detail, as they say. It is important for you to be very specific regarding what you want to give and to whom you wish to give it. Identify that person by name and address and if you have a specific wish for an asset to go to a person but have a different wish if that person predeceased you then that must be specific and cite that in your Will.

2. Constructing a Will so it cannot be overturned.

A second common error that can arise in the completion of homemade Wills is that people making the Will underestimate the specific construction rules attaching to making a Will. The Will must follow specific rules such as:-

- The Will must be in writing.
- The person completing the Will must be of sound mind at the time of signing the Will.
- The person making the Will must be over eighteen years.
- A Will must be signed or have a mark on the Will or acknowledgement which may be accepted as a signature. The Will must be signed or marked in the presence of two independent witnesses and all three persons must be in the presence of each other at the time that the Will is being executed.
- The Witnesses to your Will cannot be people who will give from your Will. If a person who you intend to benefit from your Will witnesses your signature and the execution of your Will they will be automatically disinherited.
- The Witnesses must be in your presence and see you signing the Will but they do not have to see what is written in it.
- The signature mark that you place on your Will to show due execution must be at the end of the Will.

These are some of **the legal requirements of making a Will** and if any of them are not met, the Will is not valid and it can be challenged and overturned. In this case, your assets would be divided under the Rules of Intestacy and the Law would decide which if your next of kin would take your assets and in what shares and not your Will.

Therefore to ensure that a Will is completed accordingly to the Law and cannot be challenged or overturned and that there are no queries arising as to how and where and who signed it to who you wish to get your assets, my recommendation is that you contact Cahir & Company Solicitors for advices and to assist you to draft and execute a Will.

Contesting a Will is an option always open to a person who wishes to do so but seeking advice and assistance in drafting your Will minimizes that risk and in many cases eradicates it.

3. Marriage invalidates a Will.

A third common error is that a single person who makes a Will to provide for the assets they have while they are single often don't realise that when they get married that marriage invalidates their Will. As a spouse has specific legal rights and entitlements to the assets of a spouse the Law provides that unless a Will is made *in contemplation of a Marriage to a specific person and the Will cites that particular person/spouse, a general Will of a person once they marry and change their marital status is invalid.*

The difficulty that arises with this is if a Testator does not realise that his Will is invalidated and he has a spouse and perhaps one or more children the assets of the spouse will pass two thirds to the surviving spouse and one third to the children of that marriage. The specific wish may have been for the spouse of the deceased person to receive all the assets for their own use and benefit absolutely.

4. A change or Revocation of a Will.

I have already stated that your Will will be revoked automatically in the situation where you marry or enter into a Civil Partnership your Will will be revoked unless made in contemplation of that marriage. However it is also important to note that there are other ways in which your Will can be revoked such as:-

1. If you make another Will, the first Will that you made regardless of when you made it shall be revoked. There is a clause put into all our Wills confirming that the Will you are signing at that time is your Last Will and Testament and all other Wills made prior to that date would be revoked.

2. If you burn, tear or destroy a Will, it will no longer be considered valid regardless of the wishes that you had in it and regardless of what any person proximate to you may have heard you say or read it.

3. Your spouse has a specific legal right to a share in your estate as do Civil Partners. In general as the owner of your own assets you are free to dispose of your belongings, your assets and estate as you wish but your Will is subject to certain rights for spouses and civil partners. If you have left a Will and your spouse or Civil Partner has never renounced or given up their rights to your estate as would be the case with formal separations and divorces and your spouse is not "unworthy to succeed" in legal terms, then that spouse is entitled to what is called a legal right share under the Succession Act of 1965. That legal right share entitles them to:-

(a) One half of your estate if you do not have children.
(b) One third of your estate if you do have children.

If you leave your spouse out of your Will your spouse does not have to go to Court to get this share, as any Executor or person that you place in charge of distributing your assets is obliged to grant this share to a spouse where they have been excluded and where its applicable. Your Executors must inform your spouse or their representatives of his or her right to choose between the legal right share and any gift you specifically leave in the Will. It is possible however for a spouse to renounce their rights to their legal right share.

It's important to note that this legal right share is discussed in relation to marriage as co-habiting partners have no automatic legal right to each other's estates. Although, under what's called, the redress scheme for co-habiting couples introduced by the new Civil Partnership and Certain Rights and Obligations of Co-Habitants Act 2010. A qualified co-habitant (person co-habiting with another person over a period of time) may apply for provision to be made from the estate of a Deceased co-habitantant. It's also important to note that co-habiting partners can make Wills that favor each other however it's important to note that these Wills cannot cancel out the legal rights of a spouse/civil partner if someone is separated but not divorced and their former spouse may still have a legal right to the assets of the Deceased person.

5. Agricultural Entitlements

Another common mistake in completing a Will which specifically relates to land owners and farmers is that the entitlements attaching to land are seen as a specific asset of their own. Therefore provision needs to be specifically made for those entitlements and you must specifically say whom you wish to get the entitlements after your lifetime. Entitlements do not automatically pass with the land or farm. If the entitlements are not specifically dealt with in the Will, the Succession Act of 1965 will then provide that the Rules of Intestacy would be used. Just for that reason also that Agricultural Entitlements should not form part of a Residuary Clause where you decide that anything other than the specific assets that you had set out in your Will would be divided amongst a certain person or persons. It is more likely that the Agricultural Entitlements should pass to the person obtaining the lands. For that reason specific mention of the entitlements and who they are to go to should be placed in the Will.

***Note:** *The above information is meant as a guideline only. It set outs some of the specific issues that are often overlooked in completing a Will but more importantly highlight where challenges to a Will can occur and is meant as a guide to encourage you to seek advice and specific information before completing any homemade Will and it's my recommendation that you should speak to a professional with the knowledge and experience in completing Wills and Succession Plans to ensure that your assets and your estate are passed on after your lifetime to the person you wish to receive them at the time you wish them to receive it.*

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