



REAL ESTATE

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# COVID-19: Estate Planning Considerations and Making a Will

by **Patrick Ryan**

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In these extraordinary times, people may turn their thoughts to their requirements concerning estate planning and making or revising their Wills. The purpose of this article is to draw attention to matters that need consideration and to highlight some of the fundamental legal issues that are relevant.

## 1. Having a Will or not having a Will

Where there is a valid Will in place, provided that those factors that limit freedom of disposition are provided for, the person making their Will can set out how they want their estate to be distributed.

On the other hand, where there is no valid Will, the law determines who inherits.

- The surviving spouse (or civil partner) is entitled to the whole estate where there are no children (or children of a predeceased child).
- Where there are children (or children of a predeceased child) then the surviving spouse (or civil partner) is entitled to two-thirds and the remaining one third is divided among the children (or the children of any predeceased child).
- Where there is no surviving spouse, civil partner, children or children of a predeceased child, the inheritance is routed in the first instance to the parents or surviving parents, or where no parent survives, to any surviving siblings (or their children if any sibling is predeceased).

## 2. Matters relevant to estate planning in making a Will

A person making a will must be 18 years of age and be of sound mind. The marital /civil partnership status of that person (testator) is relevant and may have a bearing on their testamentary freedom. Anyone who is married or in a civil partnership, has children or is cohabiting, may have their testamentary freedom limited by law.

In the case of assets owned by married couples/civil partners as joint tenants, these pass automatically by right of survivorship outside the estate of the deceased spouse/civil partner.

Any will made before a person validly marries or enters into a civil partnership will be revoked by operation of law except where it was made in contemplation of that marriage or civil partnership. It is also important to bear in mind that whilst marriage or a civil partnership revokes prior wills, divorce does not, so a will made whilst married or in a civil partnership (in the absence of a new will) continues in force.

Where a testator has a spouse or civil partner, that person is entitled as of right to one third of the testator's estate.

Children of a testator do not have any right to a specific share but the Succession Act does provide that a parent in making a Will has a moral obligation to make proper provision for their children.

A Will must appoint executors to administer the estate and carry out the testator's wishes (and should in appropriate circumstances appoint trustees).

Where the Will needs to create a trust that could include land, at least two trustees should be appointed, and in most cases are one and the same as the executors.

In the case of young or vulnerable children, the testator may want to ensure that proper provision is made for those children in the Will which may of necessity mean that the age at which they inherit has to be considered. In certain circumstances not all are treated equally in the future distribution of the estate.

Where the other parent of the child of a testator is still living, that parent will be the legal guardian of the minor child or children in most instances. However, if the other parent of the Testator's child is dead, or where there is a concern that the other parent may not survive the testator, or dies in a common calamity with the testator, it is necessary to appoint a testamentary guardian within the Will.

In broad terms, the principle tax that is relevant for estate planning purposes is capital acquisitions tax. Inheritances from a spouse/civil partner are tax free, whereas all other classes of beneficiaries have thresholds above which tax is generally payable at the current rate of 33%.

## **2. Making a valid Will in the current environment**

The Succession Act, 1965 sets out in very specific and clear terms what is required in order to make a valid will. It must be signed (or have the testator's signature acknowledged) by the testator in the physical presence of two independent witnesses who must each then sign in the presence of the testator. Both witnesses have to be present when the testator signs, but a suitable distance can be maintained at all times. The witnesses need to see the testator sign their name. The witnesses can do this from a distance or, even, through a window, if this makes them feel more comfortable.

Of most importance is the requirement on the part of the Testator to furnish clear and concise instructions in writing. In all probability for the duration of the crisis it may not be possible to attend at the office of the solicitor that you are instructing.

Matters can be progressed remotely by telephone or email and when the draft is in approved form arrangements can be made for the will to be executed in the presence of two independent witnesses.

## **4. Recommendations**

This COVID-19 pandemic has resulted in a sudden and profound shock for society and will inevitably cause people to consider their own particular circumstances and the needs of their families in the future. Consideration should be given to the following suggestions to ensure that you have a Will in place and that it reflects your wishes and intentions.

1. Establish whether you have made a valid will and whether it is still relevant to your particular circumstances.
2. Make a list of your assets and where they are held.
3. Decide upon your executors (preferably two) and whether you need to appoint trustees and testamentary guardians.
4. When you have made your decision, call them and let them know what you are doing and establish their willingness to act.
5. Furnish clear written instructions to your solicitor, sufficient for them to quickly establish your requirements and prepare a draft Will for your review.
6. Engage fully and get the job done so that you can have peace of mind that this important document is in place.

For further advice please contact Patrick Ryan at [pryan@lkshields.ie](mailto:pryan@lkshields.ie).

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## About the Author



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Patrick practices in the areas of commercial property law (with a particular focus on industrial property), succession planning and trust law, and administration of estates law and practice.

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