

A Client's Guide on Making your Will

Note: This Client Guide has been updated since the
Finance Act 2008

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SOLICITORS

From



Probate Tax & Trusts Department

We make your Will to suit your own requirements so each and every Will is prepared individually. This Client Guide is only an outline of the points you need to consider before you call to see us to discuss your wishes. So before you take any action based on this Client Guide please seek our specific advice.

Where any point is not covered in this Client Guide then please ask our further advice as for reasons of space we cannot set out in this Client Guide every matter you may need to consider.

*Please remember that legal, and taxation, matters are complex and you should not take any action, or inaction, just from reading one of **Thursfields' Client Guides**. You should discuss this with us first. This Client Guide only applies to Wills made in England and/or Wales and reflects Thursfields understanding of the law (in England and/or Wales) as at the date of this edition of this Client Guide.*

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Making your Will

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Making your Will

1. Why make a Will?

The purpose of your Will is for you to decide:-

- how you wish your Estate to be dealt with
- who is to have your Estate
- and with what conditions (if any).

If you do not leave a Will, so die intestate, then Parliament has made the decision for you as to how your Estate is to be dealt with. The Rules of Intestacy usually mean your Estate will pass in a way that most people would not want. Remember too that Parliament has not increased the statutory legacies in intestacies since the 1st of December 1993.

So by making a Will you have the choice to decide. We would suggest that you take that choice. This is particularly important if you are living with someone because if you die whilst still unmarried your partner will not automatically receive anything unless you leave a Will.

We also refer you to the end of this Client Guide for a glossary, or explanation, as to legal words and other terms commonly used in Wills.

2. Do I have to use a Solicitor to make my Will?

No, you do not have to use a Solicitor to make your Will. Your Will is an important legal document. A home made Will that contains a mistake, or mistakes, or creates trusts when you did not intend to is much more expensive in legal fees than the cost of making the Will with **Thursfields** in the first place!

3. What are the charges for Thursfields making my Will (or Codicil)?

Our charges for Wills are small compared to the costs of putting any mistakes right and/or coping with those mistakes and/or the potential IHT that may be saved as a result of our advice.

4. Thursfields Standard Will Writing Service

As part of the Standard Will Writing Service Thursfields will only advise you on the likely Inheritance Tax (IHT) consequences of the provisions which you have asked us to include in your Will(s) on the basis of the information which you have given to us. Thursfields will not advise you as to the most tax efficient method of drafting your Will(s) or give advice on lifetime IHT planning as part of the Standard Will Writing Service. However if you ask us to do so then you require Thursfields Comprehensive Will Writing Service, which includes providing such advice.

Thursfields current charges for a Will prepared under our Standard Will Writing Service are a minimum of the following:-

- for a single Will = **£125:00 (including VAT)**
- for two Wills (for you and your Partner) = **£200:00 (including VAT)**

We will tell you at our meeting with you if your Will(s) is/are likely to be a Complex Will. Our charges are then likely to be higher. We will tell you at the interview what our charges will then be. Examples of Complex Wills are where your Will contains large numbers of beneficiaries, or where your Will needs to include Trust provisions (which can be quite specialised), or where you have assets in another country, or where Inheritance Tax advice is needed. We reserve the right to send you an account for any abortive work for work carried out on your Wills and/or IHT planning for you.

Please also note **Section 11**, below, as to **Home Visits**.

5. Thursfields Standard Will Writing Service BUT with the use of part/all of your estate to someone for their lifetime (Lifetime Trusts in your Will)

As a result of the 2006 Budget these types of Wills are now much more complicated. This is so even if there may not be any immediate IHT liability. These Wills will take more time to take your instructions on, for us to draft, to check and then to go through with you when you call to sign them. If we send drafts to you any covering letter is likely to be longer and more detailed too.

As part of the Standard Will Writing Service Thursfields will only advise you on the likely Inheritance Tax (IHT) consequences of the provisions which you have asked us to include in your Will(s) on the basis of the information which you have given to us. Thursfields will not advise you as to the most tax efficient method of drafting your Will(s) or give advice on lifetime IHT planning as part of the Standard Will Writing Service with Lifetime Trusts. However if you ask us to do so then you require Thursfields Comprehensive Will Writing Service, which includes providing such advice.

Thursfields current charges for a Will prepared under our Standard Will Writing Service with Lifetime Trusts are a minimum of the following:-

- for a single Will = **£250:00 (including VAT)**
- for two Wills (for you and your Partner) = **£400:00 (including VAT)**

We will tell you at the meeting with you if your Will is likely to be even more Complex Will. Our charges are then likely to be higher. We will tell you at the interview what our charges will then be. Examples of Complex Wills are where your Will contains large numbers of beneficiaries, or where your Will needs to include Trust provisions (which can be quite specialised), or where you have assets in another country, or where Inheritance Tax advice is needed. We reserve the right to send you an account for any abortive work for work carried out on your Wills and/or IHT planning for you.

Please also note **Section 11**, below, as to **Home Visits**.

6. Thursfields Comprehensive Will Writing Service

Thursfields Comprehensive Will Writing Service usually includes **(A)** our charges for the specialist advice in IHT planning for you, **and (B)** making your Will(s) (which will often be more complicated, so needing additional drafting, due to implementing the IHT advice).

IHT planning in this context includes advice as to **(1)** the most tax efficient method of drafting your Will(s) **and (2)** if you so require, other lifetime IHT planning.

Thursfields current charges for a Will prepared under our Comprehensive Will Writing Service are made up (as explained) of two elements:-

- (A) Thursfields charges for the IHT advice will be based on the hourly charge of the Fee Earner you consult prepared in the usual way, **and**
- (B) Thursfields charges for the Wills and other documents themselves.

Thursfields charges are likely to be a minimum of **£700:00 (including VAT)**. We can confirm this to you at our first Meeting if there should be any changes. Frankly, it all depends on what you want to do and on the complexity of your affairs. If this needs to be revised we will let you know. We reserve the right to send you an account for any abortive work for work carried out on your Wills and/or IHT planning for you.

If as a result of the advice we give you concerning your Wills we need to take action concerning the legal title of your property (see Section 7 below) then Thursfields Property Department will be dealing with this for you, and their charges may be incorporated into the above account but may be billed separately. We can confirm this to you at our first Meeting.

Please also note **Section 11**, below, as to **Home Visits**.

7. For Codicils for Private Clients

Where you wish to make only a small change to your Will then this may be done by way of a Codicil. If this is possible then our charges will be less. We will be able to advise you, at the meeting with you when we take your instructions, whether in fact this will, in fact, be possible. We sometimes will prepare a new Will to incorporate a few changes but we charge this as a Codicil. If this is so then we will advise you of this at the meeting with you when we take your instructions.

Our charges for a Codicil are a minimum of the following:-

- for a single Codicil = **£75:00 (including VAT)**

- for two Codicils (for you and your Partner) = **£125:00 (including VAT)**

Please also note Section 11, below, as to Home Visits.

8. For Property Work for Private Clients (especially so that you can hold your property as Tenants in Common)

If as a result of the advice we give you concerning your Wills we need to take action concerning the legal title of your property to place the legal title in your names as **Tenants in Common** (usually involving a Letter of Severance) then Thursfields Property Department will be dealing with this for you, and their charges will may be incorporated into the above account but may be billed separately. We can confirm this to you at our first Meeting.

Thursfields current charges for this property work will be:-

- **£75.00 (including VAT)** plus any Search fees and Land Registry fees that may be required, if the legal title is registered, or
- **£30.00 (including VAT)** plus any Search fees and Land Registry fees that may be required, if the legal title is unregistered, **and**
- please note that these charges are for each property that we have to deal with which you need to hold as Tenants in Common.

9. Discounts for Pensioner and Disabled Clients

Thursfields give a discount, on the above charges, to pensioners and those who are disabled.

10. For Legal Help (formerly called Legal Aid) Clients

In general terms the availability of Legal Help to assist making Wills has been considerably reduced over the years. If you have been granted Legal Help (whether under the Advice and Assistance scheme {the "old" green form} or full legal aid) for, say, a Family Law matter then a further Advice and Assistance claim form may possibly be available to cover the costs of a new or amended Will. This is especially the case when you are appointing a Guardian.

11. Home visits (or a visit to a Care Home or Hospital)

We can visit you in your home or in a Care Home or in Hospital if you cannot come to our offices. This is a service that we have always provided for our clients. We recognise that it is sometimes necessary with those who need to make a Will. Please do not be afraid to ask. A home visit (or a visit to a care home or hospital) will obviously take longer for us to do this work for you as we have to travel to and from your home, and when we call to have the Will signed we may need to bring a second witness from our offices as well.

We normally would charge a sum of **£15:00**, including VAT, for each and every home visit (or a visit to a care home or hospital) in addition to our charges as above where the visit is within ten (10) miles of one of our offices.

If the home visit (or a visit to a care home or hospital) is more than ten (10) miles from one of our offices then we will agree with you a higher charge. If such a charge is made then this may be subject to any discount we offer as a result of Section 3.4 above.

Please remember that this charge is to assist clients who are elderly and/or ill and/or disabled so who could not easily come to our offices. If you request a home visit for your convenience, so not within the examples shown, then Thursfields reserve the right to charge for the time taken in traveling to see you on each and every home visit. We regret to have to add this warning but we have had some clients take advantage of this offer.

12. What is Thursfields Role?

Thursfields role is to incorporate your wishes into writing, in a form that complies with the full legal requirements so that it becomes **Your Will**.

13. Important Conditions if you are going to instruct Thursfields to prepare your Will

13.1. Assets

In order for **Thursfields** to be able to prepare your Will, you must provide us with details of the nature and extent of the property which you own and the identity of the persons or organisations which you intend to benefit under your Will. It is your responsibility to ensure that the information which you provide to us is

accurate and up to date.

13.2. Foreign Assets

Your Will may not be effective to pass property which you own which is located outside England and Wales. We do not offer advice on foreign assets as part of our standard Will drafting service. If you inform us that your own property abroad and that you require advice in relation to it, we will either provide such advice for an additional fee or we will direct you to alternative specialist advice.

13.3. Domicile

If you, or your Partner, is not domiciled in England & Wales then you need to tell us where you are domiciled. Failure to do so may mean our advice to you is incomplete and possibly incorrect as we will not be aware of all the relevant facts for you. If you are in any doubt about your domicile or anything related to this then you must discuss this with us.

Very simply everyone has a **domicile of birth** which is the country where you were born. You can later in life then acquire a **domicile of choice** which is in a country in which you intend to live in permanently (so changing your domicile from where you were born). You can have several domiciles of choice during your life. We have not set out here all of the factors that need to be considered to decide when you have acquired a new domicile and giving up an old domicile.

So this is a different legal concept from citizenship.

14. Inheritance Tax (IHT)

It is possible that your estate will be subject to IHT on your death and that the amount of tax charged may well depend upon the nature of the provisions contained in your Will. See also **Section 39** below as to IHT planning.

15. Residence (for Tax purposes)

If you, or your Partner, are resident in another country for their tax (usually income tax) purposes (so you are not resident in the United Kingdom for tax purposes) then you must tell us about this. Failure to do so may mean our advice to you is incomplete and possibly incorrect as we will not be aware of all the relevant facts for you. If you are in any doubt about your residence (for tax purposes) or anything related to this then you must discuss this with us.

Simply the Tax Authorities (so in the United Kingdom the HM Revenue & Customs) find it easier to decide when to impose taxes, both income and capital taxes, depending on where you have been living (or residing). This is easier for them to establish rather than say the concepts of domicile (see above).

16. Mental capacity (for making a Will)

Your Will is not valid unless you have the necessary mental capacity to make a Will (see **Section 21** below).

The Courts have established in any case of doubt as to capacity that it is desirable that your Doctor confirms your capacity. So in order to avoid any risk of a challenge to your Will on the basis of lack of capacity, we will ask you to sign an authority to your Doctor to obtain a report on your capacity to make a Will. Thursfields may charge an additional fee for this service and it is probable that your Doctor will make a charge for his report.

The various (medical) tests of dementia are not directly relevant to the question of testamentary capacity, nor are the criteria for mental disorder under the Mental Health Acts. The most usual (medical) test for someone with dementia is the Mini-Mental State Examination (MMSE). However as the Courts are now commenting on whether a MMSE has been carried out Thursfields may ask your Doctor, if we require a Report, to tell us whether a MMSE was carried out, and if so what was your score.

Please note that if Thursfields have not seen you when instructions are given or when you sign then Thursfields will not be able to give any advice (or evidence about this if your Will was challenged) on your capacity.

17. Knowledge and approval (of the contents of your Will)

The Courts seem to have made more of this recently in that they are saying that not only must you have the necessary mental capacity to make your Will but you must also know and approve of your Will's contents. Normally your knowledge and approval will be presumed from capacity and due execution. There will inevitably be some cases where positive proof of knowledge and approval must be given. The most contentious area for knowledge and approval is where a person has written, prepared or been otherwise instrumental in obtaining a Will under which he benefits (it is sometimes said that in such cases "the righteousness of the transaction is in question").

18. 1975 Act Advice

The **Inheritance (Provision for Family and Dependents) Act 1975** may enable certain persons to seek additional provision out of your estate after your death (this Act calls this "reasonable financial provision"). A claim can only be made under the 1975 Act by the following:-

- a surviving husband/wife who has not remarried
- by a child of the deceased
- by "children of the family" of the deceased
- by a cohabitee who has lived in the same household as the deceased as husband or wife for two years ending with the death of the deceased
- by someone who was being directly or indirectly maintained by the deceased (e.g. a former spouse who has not been married or a mistress or elderly parents living in a property owned by the deceased)

The **Civil Partnership Act 2004** will extend the above categories to include a "civil partner" being able to make a claim. The Civil Partnership Act 2004 came into force on the **5th of December 2005**. So this will extend to civil partnerships recognized under the Act after that date.

If an application is made under this Act it is likely to involve your estate in expense and may result in a variation of the dispositions made in your Will. You can leave a Statement stating why you have made the provisions in your Will which under Section 21 of the 1975 Act can be taken into account by the Court if there should be proceedings under the 1975 Act.

If the information which you provide to us for the purposes of preparing your Will suggests that there is a real risk of such an application being made in respect of your estate, we will advise you that this is the case. However we will not offer more detailed advice in relation to the 1975 Act unless you ask us to do so and, in those circumstances, an additional charge will be made.

19. Draft Will(s)

We may agree with you that we will send you draft(s) of your proposed new Will(s). If this is agreed then it is important that you read all of the draft Will(s) provisions carefully so as to make sure that you understand its contents and that it fully complies with your wishes. If you are uncertain about any provision then you must clarify this with us before you tell us that the draft Will(s) is correct and we can prepare it ready for it to be signed.

20. Thursfields Will Questionnaire

Thursfields do have a Will questionnaire which you may have been sent in advance of our meeting with you. Please help us by completing this as fully as you can especially with the full names and addresses of all the Executors, Guardians and Beneficiaries you wish to include in your Will. It would also be helpful to know exactly how they are, or are not, related to you. If you have not received a Will questionnaire then please ask for one.

21. What is the legal test for capacity to make a Will?

The test for capacity to make a Will was established by the case of **Banks v Goodfellow** which was decided in 1870. The Court said...

"It is essential that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and

with a view to the latter object, that no disorder of mind shall poison his affectations, pervert his sense of right, or prevent the exercise of his natural faculties - that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made."

22. What is the legal test for "want of knowledge and approval" in making a Will?

There is no single case that establishes the "test" for want of knowledge and approval. One of the earliest cases was *Wintle v Nye*, heard in 1959, in which the House of Lords held that the onus was on those who had drawn the Will (in that case a Solicitor) to establish that the lady who made the Will knew and approved of the contents of the Will and Codicil and that it was the duty of the court to be vigilant and jealous in scrutinizing all the circumstances.

In the case of *Fuller v Strum*, heard in 2002, the Court of Appeal stated that the phrase "the righteousness of the transaction" presupposes no moral judgment and that it is possible for the court to find that part of a Will satisfies the test of knowledge and approval and part of the Will does not but satisfy the test of knowledge and approval but that this will be rare.

23. What is the legal test for capacity to revoke a Will?

This test was established by the case of *Re Sabatini*, heard in 1970. The Court said...

"As a general rule a testator must have the same degree of understanding, when destroying his will, as when he made it. It would be illogical if different methods of revocation were to be judged by different standards."

24. The "usual" married couple's Will

For married couples we would suggest that each of you have a Will. We find that the most common married couple's Will is, roughly, on the following lines (for those who are not married the same basic considerations apply except for the first two points mentioned below):-

- Everything to my surviving spouse and he/she is to be the sole Executor - so he/she receives everything and looks after everything too
- **But** on the death of the survivor or if you die together then the rest of the Will would apply
- You need to appoint Executors to carry out your wishes - we would suggest you appoint two (2) Executors (you cannot by law have more than four {4}) - often two of your child(ren) can act as your Executors
- If you have young child(ren) you may also wish to appoint Guardian(s) (see below in Section 5 also)
- You may wish to give some item(s) to someone or some person in equal or unequal shares (i.e. a specific legacy) (e.g. jewellery to your daughter)
- You may wish to give a sum of money to someone or some person or to a group (eg "all my grandchildren") (i.e. a pecuniary legacy)
- Otherwise after all expenses are paid whatever is left over, however big or however small (your Residuary Estate), is to be divided equally between your children (or to go solely to your only child).
- You may wish to specify in your Will at what age your child(ren) or grandchild(ren) are to receive their entitlements if this is to be after 18 years of age. They become adults at 18 and receive their benefits then unless you say otherwise. If you say they are to receive their benefits when they are older than 18 you need to decide if they are receive income at 18 but the capital at the age you decide on, or they are to receive both income and capital at the age you decide. Whilst they are under 18 or the age you decide on your Executors have various discretionary powers in your Will (see below) to use the income from their share for "education, maintenance or benefit". Please bear in mind that if your estate is liable to Inheritance Tax (IHT) that specifying an age of between 18 to 25 years of age for children to benefit may, under the Finance Act 2006 have small further IHT liability when they are paid out (see below).
- Usually your Will would also go on to say that if one of your children died before you, or in the same accident even, leaving a child or children surviving you then that child(ren) would take equally between them their own parent's share of the Residuary Estate - this is what the phrase per stirpes means.
- So, if for example, you leave three (3) children if all three survive you they each take a one third (1/3) share.
- But if one child has died before you leaving two (2) children (in this example) (so they would be your grandchildren) then they would each take a one half (1/2) share of their deceased parent's one third (1/3) share of the Residuary Estate - so each child would have a one sixth (1/6) share of your Residuary Estate

- But if that one child died without leaving children then your two surviving children (in this example) would each then take a one half (1/2) share of your Residuary Estate.
- If you have young child(ren) in particular you also need to consider what you wish to include in your Will if, say, you, your spouse, and all your children died in the same accident. Who in those circumstances is your Estate to go to.
- Some people (perhaps a minority) also have firm views about burial or cremation and they want to have these included in the Will.

25. What do your Executors (or Trustees) do? (in contrast to your Guardians)

Your Executors are the people responsible for seeing that your instructions in your Will are carried out. You cannot have more than four (4) Executors.

So with your children your Executors will see to the investment of the monies due to your children at the age you decide. Your Executors will also decide on how to best use the income from those monies utilising the specific powers contained in your Will and the various statutory powers available to them too. This role is different from that of your Guardians (see below).

Once the administration of your estate has been completed (usually when your residuary estate can be calculated) then if there are any trusts in your Will which still continue, for example, the income has to be paid to a spouse for his/her lifetime, or monies have to be held until a child is 21 then the Executors, at that time, become Trustees. So the first Trustees are always the Executors you choose in your Will.

26. Why are "powers" (sub) clauses included in my Will?

In order to make any Trust(s) in your Will work we include various discretionary "powers" for your Executors to use if they decide it is appropriate. These powers get rid of some technical legal rules and improve on other legal rules. The idea is to make your Executors task as simple as possible, which in turn usually means it is cheaper to carry out the trusts of your Will.

27. Are Guardians required?

When you have young children if you die you may well need someone to take over your parental role until your children were grown up. It is often the case that with young children you all go out together as a family and occasionally accidents do happen. With a road accident it may not even be your "fault".

You have the option in your Will to appoint Guardians, and as the appointment is in your Will, they are called in those circumstances "testamentary guardians". You may consider that your Guardians should be those people who know your child or children best. This may, or may not, include relatives. It all depends on your circumstances.

28. What is the Guardian's role?

Your Guardians take over your parental duties and responsibilities, so really they take over the day to day care of your children. This may well mean taking your child/children into their own home and possibly looking after them with their own child/children too. If this happened to you we are sure you would appreciate the difficulties and sacrifices (even) that might be made by your Guardians in order to look after your child/children as may be required.

If one or more of your Executors is/are also a Guardian(s) then in exercising some of their powers, whether contained in the Will or not may mean some benefit might come to them. There is a very strict legal rule that a "Trustee must not profit from his Trust". Thursfields include a "**power**" sub-clause to cover these problems.

29. Can your Guardians be Executors also?

Yes, your Guardians can also be your Executors, so the same person/people can fill both posts. As the Guardian(s) role is different from the Executor(s) role (as each role requires their own special qualities) it may be that your choice will be different for each post anyway. It is **your** decision.

30. What other "powers" are included in my Will to cover my Guardians?

As the day to day responsibilities of Guardians are quite onerous (they are looking after your child(ren) on a day to day basis) we suggest an additional "power" clause is included in your Will.

Thursfields have prepared **two** alternative "power's" clauses. It is important for the drafting of your Will to know which of these two alternatives you want to include in your Will. We have set these out separately below (in full) for you to decide which **you** prefer.

31. The "narrow" alternative power

This alternative is as follows:-

Narrow Guardianship powers

- *it is my wish that any person(s) appointed as Guardian(s) shall not be placed in a worse position financially than if he/she/they had not accepted the Guardianship and for this reason I hope (but without placing any binding trust upon them) that my Trustees will:-*
 - ◆ *use all the income from that beneficiary's share of my Estate for his maintenance*
 - ◆ *if necessary use all/any of their other powers*

32. The "wider" alternative power

The second alternative is wider and is as follows:-

Wide Guardianship powers

- *it is my wish that any person(s) appointed as Guardian(s) shall not be placed in a worse position financially than if he/she/they had not accepted the Guardianship and for this reason I hope (but without placing any binding trust upon them) that my Trustees will:-*
 - ◆ *use all the income from that beneficiary's share of my Estate for his maintenance*
 - ◆ *if necessary use all/any of their other powers*
- *I direct that my Trustees shall during such time as any of my children have a Guardian(s) have the power to lend money with or without security and/or interest to such Guardian(s) on such terms and subject to such condition(s) (as to repayment or otherwise) or for any other purpose that my Trustees shall then think fit*
- *I direct that if my Trustees use these powers to enable the Guardian(s) to acquire a larger house or to extend their existing house or for such similar purposes then:-*
 - ◆ *I direct that my Trustees shall consider whether the interests of my children would be best served (overall) by making such arrangements by means of an absolute gift of the funds concerned to the Guardian(s) for such purposes*
 - ◆ *if my Trustees decide to proceed by way of such an absolute gift then they shall have power to do so as if such a payment were a pecuniary legacy (without interest) to the Guardian(s) made equally from the entitlement(s) of the children concerned*
 - ◆ *in making any such decision(s) **Clause 3** as to Conflict of Interests shall apply*
- *I further direct :-*
 - ◆ *my Trustees decision(s) on any matters contained in this sub clause shall have the welfare of my children as their paramount consideration taking into account all of the information then known to my Trustees and my Trustees decisions on all such matters shall be made in their absolute discretion as they shall think fit*
 - ◆ *I wish that the recipient of any gift made under this sub-clause shall endeavour to see that the funds concerned do ultimately benefit my children*

33. Why is there a difference in these sub-clauses?

These two alternatives are different in approach. If it is likely that your Guardian(s) would need to take your children into their own home as the only way of looking after your children (which is likely to be what happens) then we suggest that the wider alternative is more appropriate.

But it is your decision not ours. If, say, your Guardian(s) extend their home as the only way of coping and as the monies have really from those funds you wish your children to have when they are of the right age, is it fair to expect your Guardian(s) to pay these monies back when your children are of the right age?

This could however be open to abuse hence the further restrictions contained in the Clause. There will have to be at least one person as a Trustee who is not also a Guardian. Trustees decisions should be unanimous. We

hope this would be a sufficient safeguard.

In practice Guardians are not usually called upon to act in that role so we are talking about a rare possibility but this is still important for all concerned. You will have noticed that the narrow clause is much the same as the wider clause except for the more detailed provisions concerning properties.

34. At what age do you wish your child or children to take their benefits under your Will?

34.1. General Comments

Until the Finance Act 2006 (FA 2006) this was decided by you as you wished without having to consider any IHT consequences. Usually this was for most of our clients on the basis that "the more our children receive the longer they should wait" before those monies were paid to them absolutely or unconditionally.

34.2. What is a Bereaved Minor Trust (BMT)?

Gifts to children in your Will for deaths on or after the 22nd of March 2006 have to now comply with what the FA 2006 calls a **Bereaved Minor Trust (BMT)**. The definition for a BMT in the FA 2006 only includes gifts to **children** made in your Will. For the gift to qualify as a BMT your children must on attaining 18 become absolutely to the assets and any income arising from it and any accumulated income.

34.3. What is an 18 to 25 Trust (for children)?

The FA 2006 introduced another category of gifts to children. This has become known as the 18 to 25 trust. This is where your children are to take their inheritance at an age between 18 and age 25. If an age is chosen for your children to take between these ages then there may be further small amount of IHT to pay when they do inherit. We can explain, when we meet, whether this will apply and at what rate.

34.4. What is the IHT effect if I choose an age for my children to benefit of over 25?

The FA 2006 meant that when a gift to children is at age 25, plus 1 day old, then for IHT this will be a **Relevant Property Trust (RPT)**. The IHT consequences are different and more complicated. We will be able to explain this in more detail for you when we meet so that you can decide what instructions for your Will you wish to give us.

34.5. Conclusions for gifts to children in your Will

We are of the view, that notwithstanding these changes, that most of our clients will still want to choose the age your children take their share from your estate. The thought of your children having substantial sums of money at age 18 is a worrying thought. Would they, for example, have the maturity to be able to look after such sums? Would they misuse this chance for a better start to life? Would this be "blown" on cars, clothes and "fast living"? Would they be too tempted by alcohol, even drugs?

Remember if they are entitled absolutely then your Executors have to pay them out. Your Executors can have civil proceedings taken against them if they refused to pay out.

So please consider this carefully when you are giving us your instructions for the age at which your children take their benefits under your Will.

35. Can I leave my Spouse or Civil Partner an interest in my estate for his/her life?

35.1. General Comments

Until the FA 2006 you decided this as you wished. Up to the 21st of March 2006 this was usually called a **Life Interest Trust (LIT)**. As the person who had the use of the assets for his/her lifetime was your Spouse or Civil Partner (the Life Tenant) then **Spouse Relief** applied for IHT purposes. There would be **no** IHT due on the first death (due to spouse relief).

35.2. The FA 2006 and Immediate Post Death Interests (IPDI)

The FA 2006 made very important IHT changes. For deaths on or after the 22nd of March 2006 to qualify for the IHT treatment of a Life Interest Trust (see above) you have to pass the conditions for what the FA 2006 calls an **Immediate Post Death Interest (IPDI)**. We will be able to explain this in more detail for you when we meet so that you can decide what instructions for your Will you wish to give us.

36. Where should the Will be held?

Your Will, the actual document you sign belongs to you. You own it. But the Will should be held in a safe place. Most of our clients deposit their Wills with us. We make **NO** charge for this service. We believe that many of the Banks do make a charge if your Will is left with them, and in some cases this is an annual charge. Some clients do however wish for their Will to be held at their own bank. Some clients wish to have their Will at home with them.

Please remember that a Will can be revoked (or cancelled) by it being destroyed by you. The legal rule is that if you have your Will at home and it cannot be found after you die then the law implies that you destroyed your Will. The effect is that will die without leaving a Will, that is to say Intestate.

37. How do the Executors and/or my family know where my Will is held?

We will give you, after you sign your Will, a copy of it for you to keep at home. If you cannot remember what you included in your Will you can check your copy. The copy Will shows clearly where the original Will is held. We will also give to you a **Record Log** for you to keep with your private papers at home and this will allow you to record details of your assets and any debts. If this reasonably up to date when you die this will help in the initial work in your estate.

38. What happens if I do not make a Will? So that I die intestate.

38.1. General Comments

If you die without leaving a Will then you are said to die **intestate**. Parliament has decided for you how your estate is to be dealt with. Various Statutory Trusts will then apply to your estate automatically. The Statutory Trusts are also referred as the **Intestacy Rules**. We have set out in the examples below how the Intestacy Rules apply.

The amounts of the statutory legacies, set out below, were last increased on the **1st of December 1993**. The Government issued a Consultation Paper, in 2005, reviewing the statutory legacies with a deadline for comments by the 7th of September 2005. No announcement has yet been made of any changes.

38.2. Married people with children

38.2.1. The surviving spouse gets:-

- the personal possessions
- everything else up to **£125,000:00** ("the statutory legacy")

38.2.2. Anything remaining is then divided into two so that:-

- Half is held in trust during your spouse's lifetime and he/she gets the income. On your spouse's death this half then goes to the children.
- Half goes to your children at **18**

38.2.3. Some obvious questions that arise include:-

- Will the statutory legacy mean that your spouse can inherit your house? In practice he/she might have to make a choice between having the house without conditions or having cash without conditions.
- Is 18 too young for your children (or grandchildren) to inherit?

38.3. Married people with NO children

38.3.1. The surviving spouse gets:-

- the personal possessions
- everything else up to **£200,000:00** ("the statutory legacy") (Note: In this case the statutory legacy is higher)

38.3.2. Anything remaining is then divided into two so that:-

38.3.2.1. Half goes to your spouse without conditions.

- On your spouse's death this half then will be an asset of his/her estate and will pass under his/her Will or Intestacy.

38.3.2.2. the other half then goes as follows:-

- Half goes to your parents.
- If your parents have died before you then the half goes to your brothers and sisters equally, or their children.

- If there are none the whole of the estate passes to the surviving spouse.

38.3.2.3. An obvious question that arises includes

- Whether the statutory legacy mean that your spouse can inherit your house and have sufficient other monies to live comfortably?

38.4. Unmarried people

38.4.1. Everything you leave then passes as follows:-

- Equally to your children at **18**, or their children
- If there none then equally to your parents.
- If your parents have died before you then your estate goes to your brothers and sisters equally, or their children.
- If there are none or they have all died before you then your estate goes your half brothers and half sisters (if any) equally, or their children.
- If there are none or they have all died before you then your estate goes equally to your grandparents (on both your father and mother's side).
- If they have all died before you then your estate goes equally to your aunts and uncles, or their children. (Note: this will include aunts and uncles on both your father's and mother's side of the family).
- If they have all died before you then your estate goes equally to your half aunts and half uncles, or their children. (Note: this will include half aunts and half uncles on both your father's and mother's side of the family).
- If they have all died before you then it all goes to the Government. In 1996 there were 2,400 cases where this happened!

38.4.2. Some obvious questions that arise include:-

- If you have a Partner then he/she will not receive any part of your estate as they are not related to you. The Statutory Trusts only apply to blood relatives as you can see.
- Common examples where this applies where **Thursfields** have encountered problems include:-
 - ◆ a couple purchasing a property before they get married, or
 - ◆ couples who want to live together without getting married, or
 - ◆ parents and children sharing a property with a "granny flat", or
 - ◆ people in business with others.
- Is 18 too young for your children (or grandchildren) to inherit?
- Do you really want the possibility of the Government to have your estate?

38.5. Civil Partnership Act 2004 and its effect on Intestacy

The **Civil Partnership Act 2004** alters the intestacy trusts to include a "civil partner" (so roughly equivalent to the rights a spouse would have).

The Civil Partnership Act 2004 came into force on the **5th of December 2005**. So on or after the 5th of December 2005 once a couple have had their civil partnership registered if one partner dies intestate his/her partner will have the same rights as a spouse, as above, under the statutory trusts that apply to the partner's estate.

For a flow chart to show how the statutory trusts on intestacy work please see the end of this Client Guide

39. Does the FA 2006 also apply to gifts to my child or children if they take under my intestacy?

Until the FA 2006 this was not a consideration. IHT would be due if the total of the gifts to children were more than the Nil Rate Band with the balance above the Nil Rate Band liable at the rate of 40%. Under the statutory trusts that apply on intestacy children take absolutely at age 18. Applying the "new" rules this means that there is no specific IHT effect, as benefits for children in an intestate estate will under the Finance No 2 Bill 2006 will be **Bereaved Minor Trusts** (see above).

40. Does the FA 2006 as to IPDIs also apply to a Life Interest to my Spouse or Civil Partner under the statutory trusts on my intestacy?

Until the FA 2006 this also was not a consideration. A life interest created under the statutory trusts that apply on intestacy will be an IPDI.

41. General reminders

41.1. What happens to my Will when my divorce goes through?

When the Decree Absolute in your divorce is issued then the Law implies that:-

- the appointment of a (now) former spouse as an Executor is no longer effective
- the appointment of a (now) former spouse as a Guardian is no longer effective
- the gift to a (now) former spouse of any part of your estate is said to have "lapsed". The use of the term "lapse" has a particular legal meaning so far as Wills are concerned. The case of *Re Sinclair* has made this area of law even more complicated. **Thursfields** recommend that you revise any existing Will to delete from it all references to a former spouse. If you still want to include a former spouse as a beneficiary then any existing Will will probably still need to be revised to make this clear.

41.2. What happens to my Will if I remarry after my divorce goes through?

The act of marriage will always revoke an existing Will unless the Will was made **in contemplation of marriage** to the person you marry. If you intend to remarry after your divorce goes through then we would normally make your Will in contemplation of that marriage.

41.3. Civil Partnership Act 2004 and the "divorce" of civil partners

The **Civil Partnership Act 2004** alters the position for divorced civil partners similar to those for divorced spouses so far as this affects any existing Will at the time of that "divorce".

The Civil Partnership Act 2004 came into force on the **5th of December 2005**. So on or after the 5th of December 2005 once a couple have had their civil partnership registered and then that civil partnership has ended in "divorce" the same consequences will apply to the Wills of those civil partners as if they had been married.

41.4. "My Partner will receive my estate if I die. So why should I make a Will?"

This is wrong, it is a myth! If you are not married to your Partner then you are not related to him/her. If you die without a Will he/she will not be entitled to any part of your estate under the Intestacy Rules (see above). The surviving Partner will have to rely, in those case, on a court proceedings to try to obtain a part of the estate who has died. This is the wrong time to have to cope with that kind of additional worry when the trauma of losing a loved one has just occurred.

It is most important that you have a Will to clearly sort these matters out. **Thursfields** have had to deal with too many cases where this failure has caused unnecessary problems and anxiety to the Partner left.

41.5. Wills for Clients that are Blind or partially sighted.

For clients that are blind or partially sighted Thursfields have obtained from the **Royal National Institute for the Blind** (of 224 Great Portland Street, London, W1N 6AA - Tel: 071-388-1266) a supply of their leaflets in larger type, and in Braille and on cassette. These can be borrowed from us.

If you wish we can reprint for the partially sighted any of our **Client Guides** in larger type so that they can be read easily. If you require assistance in this way please let us know.

Please remember that we offer a discount on our charges for these clients - see **Section 8** above

42. What is a Lasting Power of Attorney (LPA)?

Some Solicitors advise their clients to always make an LPA when they sign their Wills. We do not consider that this is always necessary. However if you are suffering from any sort of progressive disease, whether physical or mental, then we would strongly advise you to have an EPA.

There are two types of LPAs, one for **Property and Affairs** and one for **Personal Welfare**. You have only been able to make an LPA since the 1st of October 2007.

For further information on LPA's please see **Thursfields** separate Leaflet and other notes on **Lasting Powers of Attorney**.

43. What are Living Wills? Or Advance (Medical) Decisions?

This is a comparatively new concept. The purpose is to make it clear, if these are your wishes, what are your

views as to:-

- Any future medical treatment which is sometimes called an **advance directive**. It seems clear from various cases that an advance refusal of medical treatment, for example, by an informed person of full capacity is binding in the absence of undue influence.
- The person(s) who you appoint as your **health care proxies**. Such an appointment will purport to give that person(s) authority to determine whether or not treatment should be given when you are no longer able to give that consent yourself. Whether such an appointment is valid, as a matter of law, is currently still doubted by some.
- The usual form of a **Living Will** incorporates both an advance directive and a health care proxy.

For further information on **Living Wills** please see **Thursfields** separate Client Guide on **Making a Living Will**.

There is an overlap between Advance Medical Decisions and the “new” Lasting Powers of Attorney for Personal Welfare.

44. Inheritance Tax (IHT) Planning

IHT is the tax that may be payable from your Estate. Your Will can be drawn up to help in planning to reduce the IHT payable on your Estate. If your assets (jointly for a couple) total more than **£312,000** (from the 6th of April 2008) (increased from £300,000) then we may well be able to help you reduce the liability to IHT on your estate(s). *It is proposed that this will increase to £325,000 from 6/4/2009 and to £350,000 from 6/4/2010.* In order to help us advise you we have a Client Guide for you to briefly schedule, or list, your assets. **Thursfields** Client Guide is called a **Schedule of Your Assets and Liabilities for Tax Planning** if you would like a copy then please do ask.

For further information on IHT please see **Thursfields** separate Client Guide on **Inheritance Tax**.

Tax saving and IHT saving is not everything. Many clients decide that how they wish their Estate to be dealt with is more important than a possible IHT saving.

One particular way of assisting with IHT is the use of a **Nil Rate Band Discretionary Trust (NRDT)**. As this arrangement is now more commonly used **Thursfields** have prepared a further **Client Guide on Wills and a Nil Rate Band Discretionary Trust (NRDT) or Tax Planning Wills** which you may wish to look through too if you consider that this is may be helpful for you.

The **Nil Rate Band** for IHT (as above) is now **£312,000** for deaths on or after the 6th of April 2008 (increased from £300,000) (*it is proposed that this will increase to £325,000 from 6/4/2009 and to £350,000 from 6/4/2010*). So for married couples this will mean that between them they will have lifetime exemptions totaling **£624,000** (that is two times £312,000) (increased from £600,000) (*so it is proposed that these will increase to £650,000 from 6/4/2009 and to £700,000 from 6/4/2010*).

45. The Spousal Nil Rate Band Transfer for IHT

The Pre Budget Report of 2007 proposed what we have called the Spousal Nil Rate Band Transfer for IHT. This is a new relief for IHT where for married couples, or civil partners, the second of them dies on or after the 9th of October 2007. This proposal was confirmed by the Finance Act 2008 which received Royal Assent on the 18th of July 2008. We refer you to **Thursfields'** Client Guide on IHT for more details of this proposed new relief and how **Thursfields** believe this will work.

We will be able to explain the Spousal Nil Rate Band Transfer in more detail for you when we meet so that you can decide how that might affect what instructions for your Will you wish to give us.

46. Historical Nil Rate Band (or Tax Threshold) data for IHT

Date of IHT event on or between	Nil Rate Band (or Tax Threshold)	So two (2) Nil Rate Bands (or Tax Thresholds) amount to...
6 April 1990 and 5 April 1991	£128,000	£256,000
6 April 1991 and 9 March 1992	£140,000	£280,000
10 March 1992 and 5 April 1995	£150,000	£300,000

6 April 1995 and 5 April 1996	£154,000	£358,000
6 April 1996 and 5 April 1997	£200,000	£400,000
6 April 1997 and 5 April 1998	£215,000	£430,000
6 April 1998 and 5 April 1999	£223,000	£446,000
6 April 1999 and 5 April 2000	£231,000	£462,000
6 April 2000 and 5 April 2001	£234,000	£468,000
6 April 2001 and 5 April 2002	£242,000	£484,000
6 April 2002 and 5 April 2003	£250,000	£500,000
6 April 2003 and 5 April 2004	£255,000	£510,000
6 April 2004 and 5 April 2005	£263,000	£526,000
6 April 2005 and 5 April 2006	£275,000	£550,000
6 April 2006 and 5 April 2007	£285,000	£570,000
6 April 2007 and 5 April 2008	£300,000	£600,000
6 April 2008 and 5 April 2009	£312,000	£624,000
<i>The 2007 Budget proposed increased rates for future Tax Years as follows:-</i>		
<i>6 April 2009 and 5 April 2010</i>	<i>£325,000</i>	<i>£650,000</i>
<i>6 April 2010 and 5 April 2011</i>	<i>£350,000</i>	<i>£700,000</i>

47. The Law as to Scottish Wills (very important if you go to live in Scotland)

The Law in Scotland (for Wills) is **different** to the law in England and Wales (for Wills). So although most of what we have said (in this Client Guide) also applies to Scotland, the important differences, Thursfields believe, under Scottish Law are as follows:-

- (A) The rules of intestate succession (what happens if you die without leaving a Will) are different. It is likely that your surviving partner may not end up with the whole of your estate.
- (B) Widowed spouses, children and other descendants have "legal rights" - a fixed share of your moveable property (i.e. anything other than land) which they are entitled to claim, whatever your Will says.
- (C) In Scotland, anyone over the age of 12 can make a Will.
- (D) **Your old Will is not invalidated if you get married, legally separated or divorced.** So if your marital situation changes in any of these ways, you should review your Will as soon as you possibly can.
- (E) Your Will may be invalidated if you have a child after signing the Will and have not dealt with this possibility in the Will.
- (F) If you live in Scotland or have a Will made in Scottish form, you should seek advice on the right Clauses to use in your Will or Codicil. Your Scottish solicitor will make sure that the Will is legally correct and that your wishes can be carried out.

Thursfields recommend that you therefore discuss your English Will with a Scottish Solicitor to ensure that your wishes are effective. Please ask Thursfields who may be able to recommend a firm of Solicitors in Scotland to help you.

48. Further Reading?

Thursfields suggest you also may wish to read:-

- Thursfields **Client Guide** called **Wills and a Nil Rate Band Discretionary Trust (NRDT) - a Tax Planning Will**.
- Thursfields **Client Guide** called **Inheritance Tax (IHT)**
- Thursfields **IHT planning checklist** which is to assist in making suggestions for your IHT and to provide bullet points for any meeting you have with Thursfields to discuss IHT planning.

You may wish to visit the Government Web Site for HM Revenue & Customs at www.hmrc.gov.uk

49. An explanation of legal words and/or terms commonly used in Wills and/or Probate matters.

- **Administrator(s)** - The person(s) responsible for dealing with the Estate of an Intestate. This will usually be a relative. A woman who is acting as an Administrator is more correctly called a **Administratrix**. When two or more women act in this capacity together they are referred to as **Administratrices**.
- **Assent** - The correct name for the Deed which transfers the legal title of a property (i.e. a house) to the

person(s) entitled in the Estate. Where there is registered legal title this is completed using the Land Registry Form AS1.

- **Beneficiary** - The name used for a person or organisation (e.g. a charity) who is to a benefit from an Estate.
- **Bereaved Minor Trust (BMT)** - A new definition for a specific kind of trust created in a Will or under the statutory trusts that apply on an Intestacy for children since the 22nd of March 2006 - see Sub-Section 33.8 above.
- **Bequest** - Strictly used for a specific gift of a property e.g. a house.
- **Codicil** - A document made after a Will has been completed adding to or altering or amending the terms of the Will itself. A Codicil and the Will have to be read together to see the full wishes of the Testator.
- **Civil Partner & Civil Partnership** - The **Civil Partnership Act 2004** defines these terms for formal same sex relationships. The **Civil Partnership Act 2004** came into force on the **5th of December 2005**
- **Estate** - All your assets at the time of your death.
- **Executor(s)** - The person(s) appointed by you who are responsible for carrying out the instructions in the Will. A woman who is acting as an Executor is more correctly called an **Executrix**. When two or more women act in this capacity together they are referred to as **Executrices**. You cannot have more than four (4) Executors. Normally Executors act unanimously, but very occasionally a Will allows for majority voting.
- **Guardian(s) (testamentary)** - The person(s) you appoint in your Will to look after your child(ren) under 18 on a day to day basis as if they were their parents.
- **Immediate Post Death Interest (IPDI)** - A new definition for a specific kind Life Interest Trust for a Spouse or Civil Partner since the 22nd of March 2006 - See Section 34 above.
- **IHT** - Inheritance Tax.
- **Intestate** - When a person who dies without leaving a valid Will he/she is said to have died Intestate. Your Estate will then be distributed according to the statutory trusts (or rules) known as the rules or laws of **Intestacy**.
- **Legacy** - The name for a gift of a particular item in a Will e.g.
 - ◆ a sum of money (i.e. a **pecuniary** legacy)
 - ◆ or an item e.g. jewellery (i.e. a **specific** legacy)
- **Joint Tenants** - Where two, or more, people own a property (this could be any asset and includes a "building" type property) then when one of them dies his/her share in the property (usually this is an equal share) passes (automatically under English Law) to the survivors the moment before he/she dies. This is a kind of legal fiction. **Note:** Compare and contrast the term **Tenants in Common** below (which operates in the reverse way).
- **Legatee** - The name used for a person or organisation who is left a legacy in a Will.
- **Letters of Administration (Grant of)** - Strictly the name for the document that authorises the Administrators to administer the Estate of an Intestate.
- **Personal Chattels** - This is a legal definition for household goods and personal effects without having to list all these separately. The term includes your car.
- **Personal Representative(s)** - This is a generic term for any person who acts in the administration of an Estate whether as an Executor(rix) or as an Administrator(rix).
- **Probate (Grant of)** - Strictly the name for the document that authorises the Executors to administer an Estate when the deceased left a Will.
- **Related Settlement Rules (for IHT)** - When these apply they affect all trusts that are created on the same day - see Sub-Section 33.4 above.
- **Relevant Property Trust (RPT)** - A new definition most trusts since the 22nd of March 2006 - see Sub-Section 33.3 above.
- **Residuary Legacy** - The gift of all or part of the residue of your Estate.
- **Residue** - The remaining assets in an Estate after all of the debts, tax costs and legacies have been paid.
- **Spouse** - Your husband or wife.
- **Tenants in Common** - Where two, or more, people own a property (this can only a "building" type property - so this does not include a cash asset) then when one of them dies his/her share in the property (which may be an equal share but this also be an unequal share) passes **not** to the survivors **but** instead passes under the terms of his/her Will (which may, or may not, leave this property to the survivors). **Note:** Compare and contrast the term **Joint Tenants** above (which operates in the reverse way).
- **Testator** - The correct name for a man who has made a Will (and Codicil - if any).
- **Testatrix** - The correct name for a woman who has made a Will (and Codicil - if any).
- **Trustee(s)** - If the Will leaves someone's benefit(s) "**on trust**", e.g. until someone is 21, then when the

Estate has been completed the Executor(s) become Trustees until the trust is complete, e.g. when the person is 21.

- **Will** - A document containing a person's wishes on their death. This must comply with the statutory requirements for it to be a "Will".
 - **Will Trust** - A "Will" which contain a Trust (usually an on-going trust).
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50. A flow chart to show how the statutory trusts on intestacy work.

