MARCUS BISHOP ASSOCIATES
Chartered Certified Accountants

ESTATE & TAX PLANNING

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Who can write my Will for me if I am not able?

The appointment of an Attorney can help you deal with your affairs once you are no longer able. But they are not allowed to write a Will on your behalf.

By appointing an Attorney under a Lasting Power of Attorney (LPA), you can have someone you trust to deal with both your financial affairs and your health and welfare, should you become unable to manage them yourself.

If you do not make provision for an Attorney to act on your behalf, then your loved ones may have to make a lengthy and expensive court application in order to appoint one if you lose the ability to deal with your affairs.

You can choose to appoint an Attorney to deal with your health and welfare and in respect of your financial matters, or you can appoint an Attorney for only one of these aspects.

With regard to health and welfare, the Attorney can only act for you once you have lost the capacity to make your own decisions. In respect of a financial affairs LPA, you can choose to implement this while you still have capacity. This means that your Attorney could, for example, help you by going to the bank on your behalf if you find it difficult to go there yourself.

If you do not have a Will in place, and you lose the capacity to make one, your Attorney or anyone else cannot write one on your behalf. The process of putting a Will in place in this situation can be complicated and lengthy. An application would need to be made to the Court of Protection by your Attorney, asking them to put in place a Statutory Will.

Applying for a Statutory Will

The Court of Protection will need to see all the details of your financial situation when an application for a Statutory Will is made. This will include details of exactly what is in your estate, your outgoings, for example, care home fees, and also information regarding your family relationships.

The Official Solicitor will act on your behalf to review the information provided and put in place a Statutory Will that they consider to be fair. Anyone who may have expected to receive an inheritance from you can be involved in the process and will have the right to have their views considered.

Avoiding the need for a Statutory Will

By putting a Will in place while you still have the capacity, you can avoid the difficulties of potentially having a Statutory Will. Having a Will drawn up by a qualified professional means that you can be sure that your loved ones will receive what you wish them to have. You can also discuss estate planning, to ensure that your assets are protected as far as possible from expenses such as Inheritance Tax. You may also want to ensure that loved ones have the benefit of living in any property you own for as long as they need to.

Protecting your assets with a Life Interest Trust

Leaving someone a life interest in your Will means they will have the benefit of the asset, for example a property, for the rest of their life following which it will pass to a beneficiary chosen by you.

There may be times when it is better to leave someone a life interest, rather than give them an asset outright. By setting up a trust in your Will, you can arrange for a loved one to have use of the asset for as long as they want or need, then give it to a third person. There are two main reasons why someone might wish to proceed in this way.

To prevent the 'sideways disinheritance trap'

The so-called sideways disinheritance trap occurs when someone with children from a previous relationship remarries. If their estate passes to their new spouse when they die, then their children may receive nothing. This can happen either because their new spouse makes a Will leaving the estate elsewhere, the new spouse fails to make a Will meaning that the estate passes to their relatives (this does not include step-children) or because the new spouse uses all of the funds, for example for care home fees.

To protect assets from care home fees

If a couple leaves all of their assets to each other, then there is a risk that the last to die will use up all of the funds in paying for care home fees. The local authority will not provide financial support until the value of a person's assets, to include any home, falls below a set threshold, currently £23,250. This means that very little from the joint estate may be left to pass on to any children.

Using a life interest trust to protect assets

By including a life interest trust in a Will, rather than simply leaving the whole estate to a spouse, the sideways disinheritance trap can be avoided.

You can leave your new spouse the right to live in a jointly owned property for the rest of life. They would still be able to move house if they wanted, and retain a life interest in the new home. But on their death, your interest in the property or other assets would pass to your chosen beneficiaries as detailed in your Will. To pass only a life interest in a property, it must be owned as tenants in common and not as joint tenants, otherwise the property automatically becomes solely owned by the other joint owner on the death of the first to die.

Similarly, by leaving a spouse the right to live in a property for the rest of their life, but not passing them your share outright, you can prevent your half of the property being included in local authority calculations for any care home fees they may incur.

It is advisable to seek professional advice to ensure that your assets are adequately protected and that they will ultimately pass to your choice of beneficiary

If you would like to discuss your Estate & Tax Planning, call David on 020 8670 0917 or email him at: david@marcus-bishop-associates.co.uk.