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Wills Advice for New Parents

A Will review is a vital consideration when a person first becomes a parent. Whether married or unmarried, most individuals' Wills do not take account of future children, unless they already have at least one child .

Whilst we all hope to live to see our children into adulthood and many years beyond, sadly there is always the chance that this may not happen, and it is crucial that a parent provide for the care, welfare and financial support of their children in the terms of their Will. Quite apart from the obvious wish to ensure children are now included as beneficiaries, there are a number of additional elements which become relevant to the testator (maker of the Will).

Whilst some parents may decide to leave a share of their estate to their child or children on their death, many choose to leave their whole estate to their spouse or partner, and thereafter leave both estates to their children on second death only. In both circumstances, it is essential to note that children are entitled to make a claim to legal rights in the estate of a deceased parent.

The child or children, as a group, will be entitled to one third of the moveable estate (i.e. – one third of everything excepting any houses, land, or other buildings) between them, if the parent is survived by a spouse or civil partner. If there is no surviving spouse or civil partner, the children are entitled to claim half the moveable estate between them. If a child is under the age of 16, sums must be held to cover a potential claim in this regard, until the child reaches the appropriate age to make an election.

Even if the child makes a decision to renounce his or her legal rights at the age of 16 or 17, that decision can be set aside in certain circumstances, and therefore the estate should hold the sums until the child reaches the age of 18, unless claimed at 16 or 17.

If a child is to be left a share of the parent's estate, the parent must consider the age at which they wish the child to inherit that share. The law in Scotland states that if a Will does not specify otherwise, the child is entitled to their share at the age of 16, and the executors have no right to withhold funds or property after the child reaches that age. Given the option, many parents feel that they would prefer the funds and/or assets to be held by the executors on behalf of the child until an older age has been achieved, such as 18, 21, or sometimes even older, and in this situation, a form of trust will be created within the Will.

The trustees are given the discretion to make payments from the income and the capital to the beneficiaries in such circumstances as they deem appropriate for the benefit of that beneficiary, such as for educational purposes, living costs, etc. Provision can also be made for payments to be made to the child's guardian in appropriate circumstances.

During the period until the child attains the designated age, income from his or her share would either be paid over to the beneficiary at the discretion of the trustees or retained and accumulated with the capital for payment. A similar form of trust can be set up by a parent to provide for a disabled child, which can continue indefinitely and provide the necessary financial support to that child which the parent will have provided during their lifetime.

The choice of executors and trustees becomes a more significant decision when the foregoing is taken into account. Not only are the individuals named responsible for administering the estate and ensuring that the wishes of the parent are adhered to, they are now effectively in the position of a financial controller for the child or children, until they reach the age specified in the Will.

It is generally the case that the other parent will be named as one trustee (unless the parents are not together, in which case it is not usually appropriate), with either one or two further trustees, or one or two substitute trustees, to act in the place of the surviving parent in the event that both parents have passed away.

It is inadvisable to name only one trustee, as there is always the risk that this individual could pre-decease, or pass away at the same time as, the testator, or indeed during the term of the trust, leaving no co-trustee. The appointment of a trustee in this situation is governed by strict rules based on familial ties to the parent, and there is always the risk that a person the testator would have deemed unsuitable is appointed to the role.

Consideration of suitable guardians should also be made when the Will is reviewed, in the circumstance that both parents pass away before the child (or children) reaches the age of 16. This should be a joint decision between the parents, and should be inserted into both Wills to avoid any confusion.

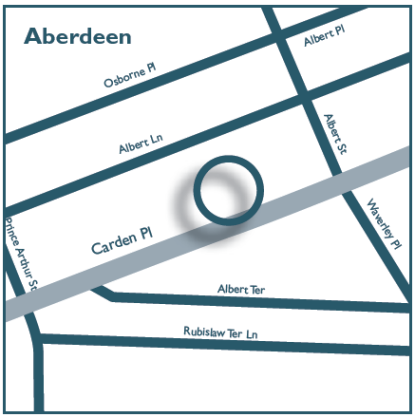
It is generally advisable to name more than one guardian, or at least, if only one guardian is chosen, then a substitute guardian should also be named, in case the first is unable or unwilling to take on the role. The matter should also be discussed with proposed guardians prior to inclusion in the Will to ensure that they are prepared to accept the responsibility.

Another matter which may now become relevant is specific legacies of items to children which are considered to be family heirlooms. These can be included within the body of the Will itself, or contained within an “informal writing”. The Will should include a clause providing that informal writings will be legally binding and read alongside the Will.

In order to be valid, these can either be typed or handwritten by the testator, and then simply signed and dated. The benefit is that such a document can be retained at home and altered by the testator as they wish (provided alterations are initialled in ink), without a need to amend the Will itself.

It is strongly recommended that Wills are then reviewed every five years, or more often if there has been a change in circumstances. If the Will is reviewed regularly, the testator can ensure that the terms continue to reflect both their wishes and their current family situation.

For more information or if you wish to discuss how we can assist you, please contact Ashleigh McConnell on 01224 86 86 87 or by email on ashleigh@mackinnons.com



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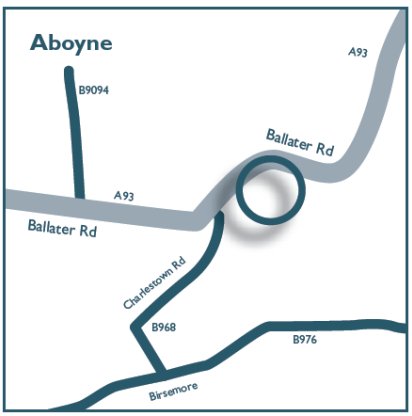

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