

One of the traditional fields of country solicitors, our **Probate Department** offers expert help on wills, living wills, inheritance tax planning, probate and trust management.

The extensive range of areas we cover includes:

- Inheritance Act Proceedings
- Will Challenges
- The 2006 Finance Act and how it affects Will Trusts
- Disabled Trusts
- Enduring Power of Attorney
- Lasting Power of Attorney
- Court of Protection work
- Mitigation of Inheritance Tax

MAKING YOUR OWN WILL

It is advisable to engage a solicitor to make a Will. You can make your own Will and pre-printed Will forms are available from stationery shops but if after your death a problem arises with the drafting or formalities of the Will this may prevent your wishes being carried out.

If you instruct a Bank to make your will they will want to appoint themselves as executors. **BEWARE!** This could cost your estate up to 4% of its value plus charges per item. Banks also often use non-qualified Will-writers.

We are a professional firm not making money for shareholders; we charge for the work we actually do.

The beginning of the Will should state that this Will revokes all others. If you have an earlier will this should be destroyed.

The Will should name at least two executors (just in case one dies before you) who will deal with the administration of the estate and they will also be your trustees if any beneficiaries are minors (children). They will be responsible for investing and looking after any gifts until the child or children are entitled to inherit; this would also apply to any trusts you may wish to set up in your Will. Your estate includes all money, property and possessions owned by you in the UK or abroad. Sufficient details should be given of any possessions being bequeathed and of the beneficiaries receiving them that both can be identified (for example beneficiaries should be identified by their full names and relationships to you). The remainder of your estate which is left once any specified gifts and or pecuniary legacies have been made is known as the residue. Provision should be made for the eventuality of one or more of the beneficiaries predeceasing you. Action should also be taken if you own property abroad, both to ensure that any Will you make effectively deals with that property and also to avoid a Will made under the laws of one country inadvertently revoking another.

WITNESSING THE WILL

Your signature to the Will must be correctly witnessed by two competent and independent people present at the same time as you sign the Will. The witnesses' husbands or wives must not benefit from the Will so it is important to select the witnesses from people who will not or whose relatives will not receive any benefit from it.

GOING TO A SOLICITOR

This is even more important if you intend to leave significant sums to people other than those who might expect to inherit e.g. husband, wife or children in case of a later dispute.

We at Milne and Lyall are happy to visit you in your own home, care home or hospital to discuss your Will and the likely costs.

REVISING THE WILL

If you marry or remarry your Will becomes invalid unless it was made in contemplation of marriage (that is you were intending to marry when the Will was made and it refers to your proposed marriage) and should be revised. Divorce does not automatically make a Will invalid, merely the gifts to your former spouse. Codicils (supplements to a Will) can be added to an existing Will for minor changes. These must be correctly witnessed but the witnesses need not be the same as for the original Will.

If anything substantial needs to be changed you should make a new Will revoking the former one.

You do not need to make a new Will if you change address; simply place a note with your current Will.

NEVER make alterations on the original document as this will invalidate the original document. Any change must be by codicil or a new Will.

WHERE TO KEEP THE WILL

It should be kept safe with important papers at home or lodged with a solicitor or bank. Milne and Lyall can store your Will free of charge for established clients. It can also be lodged for safe keeping at the Probate Department at the Principal Registry of the Family Division First Avenue House 42-49 High Holborn London WC1V 6NP. A fee of £15 is charged when the Will is deposited.

If Milne and Lyall make your Will we normally keep the Will in our strongroom and forward copies to you. You are entitled to the original if you wish but it is important to keep the original Will safe and you must not mark the Will in any way with pen, clips or staples.

FUNERAL

If you have particular views about your funeral write a letter to your executor explaining how you would like it conducted and lodge this with your Will or if you have already purchased a funeral plan a copy needs to be placed with your Will.

TAXES ON YOUR DEATH

Inheritance tax is not incurred where everything is left between husband and wife or civil partners and the survivor is domiciled (has their permanent home) in the UK. Beyond that relationship, tax is payable and varies depending on Budget changes. For the 2008-2009 financial year no tax is charged on estates under £312,000. This will include the value of your house if you own it and gifts made within the last seven years except for those which are exempted (free of tax), that is £3000 in each tax year, plus any of the previous years' allowances that have not been used. Both husband and wife or civil partners can give gifts of this amount. Exemption is also allowed on wedding gifts up to £5000 by each parent or step parent, £2500 by each grandparent or great grandparent, or £1000 by people outside the categories mentioned. The exemption of payments out of normal expenditure can usefully be used to fund a life policy to pay inheritance tax.

This tax is becoming more and more of a problem because the rate of increase of house prices has greatly exceeded the annual increase in the nil rate band (the amount that is not taxed). There is scope for tax planning measures both during lifetime and by Will, and we at Milne and Lyall have a specialised team that deals with this.

WHAT HAPPENS IF YOU DO NOT MAKE A WILL?

If you do not make a Will you die intestate and your property will be divided according to the Administration of Estates Act. The following gives you a brief idea of what would happen:

The rules applicable depend on which relations survive you but if it is your husband or wife then he or she will only be entitled to the first £125,000 of the estate and all the personal possessions, so if you own your own home your husband or wife does not automatically receive the entire property and it may have to be sold to pay other beneficiaries. Surviving children or grandchildren will be entitled to some of the estate if it exceeds £125,000.

THE COURT OF PROTECTION AND THE OFFICE OF THE PUBLIC GUARDIAN

The Court of Protection

If you can no longer manage your financial affairs and have not granted a Power of Attorney then an application for Deputyship may need to be made to the Court of Protection. The Court of Protection is an Office of the Supreme

Court. It exists to protect the property and financial affairs of people who are by reason of a mental disorder incapable of dealing with their own affairs. The Court's jurisdiction extends to England and Wales.

Proceedings in the Court are conducted in private to protect the privacy of the persons concerned. It is not normally necessary to appear before the Court as its business is usually conducted by post.

If an appearance is necessary the Court keeps its procedures as informal as possible.

The Office of the Public Guardian

The OPG is the administrative arm of the Court of Protection and part of the Department for Constitutional Affairs. It is also responsible for the registration of EPAs and LPAs.

The effect of the involvement of the Court of Protection and the OPG in the management and administration of the financial affairs of a person suffering from a mental incapacity is to give proper legal authority to the person whom the Court appoints as Deputy to deal fully with the patient's financial and personal affairs. If you deal with somebody's affairs without a power of attorney when they are suffering from mental incapacity and their affairs involve more than just the collection and spending of benefits on their behalf you may be acting without full legal authority. For this reason it is advisable to consider making an application to the Court of Protection.

PERSONAL LIABILITY

An attorney or Deputy may be held personally liable if the person's money is not handled in a responsible manner.

THE POWERS OF THE COURT AND/OR THE OFFICE OF THE PUBLIC GUARDIAN

The Court may appoint a Deputy. If assets are below £16,000 it may make a Short Order regarding the client's (patient's) affairs, in place of a Full Order. However these are discretionary and will only be considered after the Court has received the application.

JURISDICTION OF THE COURT OR OFFICE OF PUBLIC GUARDIAN

The Court or the Office of Public Guardian (OPG) must be satisfied after considering the medical evidence that the person is not only suffering from a mental disorder but is also incapable for that reason of managing their financial affairs. Only in these circumstances will they have jurisdiction. The person is then described as a "patient".

WHEN WILL THE COURT OF PROTECTION OR OFFICE OF PUBLIC GUARDIAN BECOME INVOLVED?

The Court of Protection and the Office of Public Guardian (OPG) would only become involved if something needed to be done either to protect your assets or to enable them to be used for your benefit. For example if you own your home but are unlikely to return to it then it may be necessary to sell the property so that the proceeds may be used for your benefit. Other examples are if capital and savings have accumulated or if use of an appointee's powers is no longer appropriate.

DEPUTYSHIP

Applying for Deputyship

If it is necessary to apply to the Court the application is normally made by the nearest relative or a friend but an application may be made by others such as a solicitor, accountant, bank manager, or local authority. The person making an application should write to or telephone the Protection Division explaining the situation. The Office of Public Guardian will then send the necessary forms. You can also obtain these forms from Milne and Lyall should we be instructed.

Completing the Forms to apply for Deputyship

If the application is for Deputyship the forms to be completed are:

1. the application form (COP1)
2. a statement of financial information (COP1A) and/or personal information(COP1B)
3. an assessment of capacity (COP3) – the doctor must give a diagnosis of the patient's condition and an explanation of why they cannot manage their own affairs, and may charge a fee for completing the certificate.
4. a Deputy Declaration

The completed papers must be returned to the OPG with the commencement fee of £400. There is a fee remission scheme in place for applications and a claim form should be completed if appropriate (EX160).

Fees may eventually be reclaimed from the patient's estate. If there are insufficient funds available to pay the fee then the application should contain a request for the application to be issued and for the fee to be paid at a later date.

As the fees and remission criteria change from time to time you may wish to ask whether they apply to your application.

Requirements for Security

To safeguard the patient's assets the Court requires a security bond – this is like an insurance policy with an annual premium payable out of the patient's money. The amount of any security is set by the Court in proportion to the patient's annual income.

Notice to Patient

Before a Deputy is appointed the Office of the Public Guardian will let the applicant have a letter prepared by the Office and addressed to the patient explaining why the application has been made by whom and what steps are proposed. The patient may write or telephone the Court if they object to any of the proposals.

Time for Service of Notice

The letter (or Notice) has to be given personally to the patient. Notification must be given at least 10 days before a decision is made.

Court Decision

The Office of Public Guardian will assess the Client's (patient's) needs before the Court of Protection appoints a Deputy. This is intended to ensure that the right degree of help as well as supervision is arranged.

If the Court is satisfied with the information provided it will appoint the applicant or, as a last resort, a professional Deputy. Once appointed, the Deputy takes control of the patient's affairs and property and acts on the patient's behalf in accordance with the Court's instructions.

A Deputy:

1. is responsible for collecting the patient's income and paying bills
2. should administer the patient's affairs in the best interests of the patient
3. should try to be aware of the patient's needs and wishes
4. should use the patient's money for the patient's benefit (in the widest sense) during the patient's lifetime
5. should consult with the patient as far as is reasonable and practicable about how the patient would like his/her money spent

Cases of Urgency

If you need access to some of the patient's money urgently for example to pay fees in a care home you should ask for an "interim order" when you submit the papers to the Court.

THE ROLE OF THE DEPUTY – THEIR POWERS INCLUDING LIMITATIONS

Deputies are accountable to the OPG usually on an annual basis for their financial dealings with a patient's money.

A Deputy also has a duty to consult with the patient if it is reasonable and practical to do so to find out how the patient wishes his or her financial affairs to be dealt with. Any reasonable and practical wishes should be put to the

OPG to approve on behalf of the patient.

In cases where it is reasonable to do so the Deputy must also ensure that the patient is given every opportunity to manage small sums of money on a day-to-day basis for small purchases, etc.

A Deputy may sign on behalf of the patient who is a non-tax payer for bank and building society interest to be paid without deduction of income tax.

The patient may make a Will if the Court considers that the patient has “testamentary capacity”. If the Court is satisfied that the patient is incapable of making a Will then the Court has power to make a statutory Will for the patient making provision which the Court considers the patient would have wanted.

PRODUCTION OF ACCOUNTS

The Deputy is usually required to submit yearly accounts concerning the patient’s estate although the OPG may agree to accept instead answers to a questionnaire sent out annually.

CIVIL PARTNERSHIP ACT 2004

What is Civil Partnership?

Civil partnership is a new legal relationship, which can be registered by two people of the same sex. It gives same-sex couples the ability to obtain legal recognition for their relationship.

Civil partnership came into force on 5 December 2005. The first civil partnerships registered in England and Wales under the standard procedure took place on 21 December. In some special circumstances, some civil partnerships were registered from 5 December.

Certain relationships registered overseas (civil unions, same-sex marriages) may automatically be treated as civil partnerships in the UK from 5 December provided certain conditions are met.

Civil partners will have equal treatment in a wide range of legal matters with married couples, including:

- Tax, including inheritance tax
- Employment benefits
- Ability to apply for parental responsibility for your civil partner’s child
- Inheritance of a tenancy agreement
- Recognition under intestacy rules
- Access to fatal accidents compensation
- Protection from domestic violence
- Recognition for immigration and nationality purposes

Who can register?

Two people may register a civil partnership provided:

- They are of the same sex
- They are not already in a civil partnership or lawfully married
- They are not within prohibited degrees of relationship (e.g. closely related)
- They are both aged 16 or over (and, if either of them is under 18 the consent of the appropriate person has been obtained)

LASTING POWERS OF ATTORNEY

The Mental Capacity Act 2005 has made provision for people to choose someone to manage not only their finances and property should they become incapable, but also to make health and welfare decisions on their behalf. They will be able to do this through a lasting power of attorney (LPA). LPAs replaced EPAs in October 2007, when the Mental Capacity Act came into force, although EPAs made before this time are still valid.

A Health and Welfare LPA will enable you (the donor) to nominate a spokesperson (the attorney, sometimes referred to as a 'donee') to make decisions regarding your personal welfare, including healthcare and consent to medical treatment. Different attorneys can be named for making different kinds of decisions; you will need to think carefully about who you nominate.

Whereas an EPA can be used when the person still has capacity, an LPA will only become legal once the person has lost capacity. Both EPAs and LPAs will need to be set up using an official form and be registered with the Office of the Public Guardian (formerly the Public Guardianship Office).

You must decide whether you want your attorney to act generally or only in relation to specific situations. For example, the attorney will only be able to make decisions about end of life treatment if you have included this in a clear statement on the LPA form. However, the LPA form will not grant the attorney the right to demand certain medical treatment for you if the medical professionals are not in agreement; nor will it give the attorney the right to make decisions which are not in your best interests.

