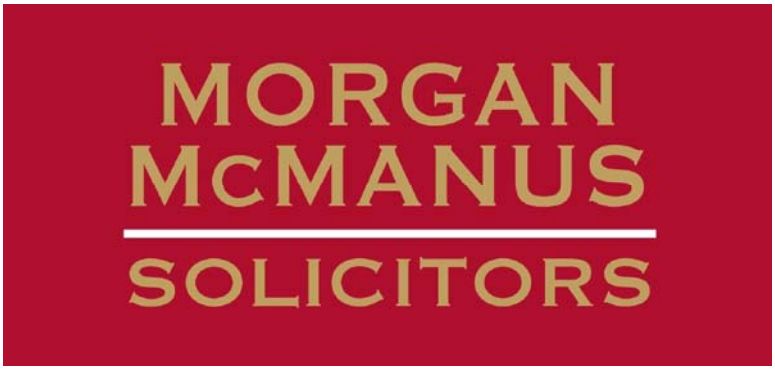

MAKING A WILL

NORTHERN IRELAND

1.0 WHAT HAPPENS IF I DIE <u>WITHOUT</u> MAKING ANY WILL?

If you die without making a Will or if you do not give away all of your assets in a Will, an intestacy or partial intestacy is created. When any kind of intestacy is created, inheritance depends on the rules of intestacy. How the estate is distributed according to the various scenarios is set out in sections 1.3. to 1.6. However, it may be necessary to understand, firstly, the rules relating to the hierarchy of "next of kin" and the "per stirpes" which set out in sections 1.1 and 1.2 below.

Note also that the application of the intestacy rules may not be the end of deciding who gets what in the estate. The distribution of an intestate estate can be challenged in court if it does not make adequate financial provision for a person who is by law entitled to claim against the estate under the Inheritance (Provision for Family and Dependants) (NI) Order 1979. The Inheritance (Provision for Family and Dependants) Order 1979 is discussed in more detail in section 5.00 below.

1.1. Next of Kin

If all or any part of the estate becomes inheritable by next of kin (excluding the spouse) then the people who inherit will come from the most senior group of next of kin, subject (in the case of higher priority groups) to the "per stirpes" rules (see 2. below). Nobody from a particular group can inherit unless all relatives from the higher priority groups do not survive the deceased. Where there is more than one person from the same group, they take in equal shares subject to the "per stirpes" rule in the case of the higher priority groups. The Order of priority of groups is as follows:

(a) Issue (descendants (children, grandchildren, etc.) living at the deceased's death) Later generations of issue take subject to the "per stirpes" rule explained in 2. below;
(b) Parents
(c) Brothers and sisters and their issue (subject to the "per stirpes" rule).

Note that if there is a surviving spouse none of the following groups can inherit

(d) Grandparents
(e) Uncles and aunts and their issue subject to the per stirpes rule

Note that the Per stirpes rule does not apply to any of the following categories

(f) Great Grandparents
(g) Grand uncles and aunts
(h) Great Grand Uncles and Aunts and children of great grand uncles and Aunts (these categories are both of the same degree)
(i) Great great great grandparents

(j) Second cousins (i.e. children of the children of grand-uncles and grand-aunts or children of great-grand-uncles or great-grand aunts)
(k) Other next of kin of the nearest degree

In the absence of next of kin, the estate passes to the Crown

Adopted Children are treated in law as if they were born to the Adopter's family. They have no rights in relation to their old blood family. Illegitimate children now have the same rights as legitimate children.

1.2. The "Per stirpes" rule.

"Per Stirpes" occurs when a person who is a child of somebody who predeceased but otherwise would have been able inherit takes his parent's share or part of his parent's share. If there is more than one child of the dead parent the children take their parent's share in equal shares. This rule can apply to later generations of issue, i.e. grandchildren and great grandchildren. The rule applies to children of brothers, sisters, uncles and aunts but not grand uncles and aunts or remoter relatives.

1.3. If there is no surviving surviving spouse

The next of kin take according to the rules or priority and per stirpes (if relevant) set out in sections 1.1 and 1.2 above.

1.4. In order that you can understand the rules set out below you need to understand that the word "issue" includes children, grandchildren and great grandchildren etc. living at the date of the deceased person's death.

If there is a surviving spouse (or Civil Partner) and surviving issue, the spouse gets

(a) The first Stg£250,000; and
(b) The personal chattels; and
(c) (i) If there is one surviving child (with no predeceased child leaving issue) or no surviving children and one predeceased child leaving issue, <u>half</u> of the residue
(ii) if the deceased had no surviving children but more than one predeceased child leaving surviving issue, or one surviving child and one or more predeceased children leaving issue, or at least two surviving children, <u>one third</u> of the residue.

And in the case of (c) (i) above, the child (or if predeceased the issue) gets one half of the residue. **And** in the case of (c) (ii) above, the children, child or issue get two thirds of the residue.

1.5. If there is a surviving spouse (or Civil Partner) and no issue but surviving parents, siblings (or their issue) the spouse (or Civil Partner) gets
(a) the first £450,000
(b) the personal chattels

(C) one half of the residue

And the other half of the residue is divided as follows: If the deceased is survived by one or more parent, they take in equal shares but if there are no surviving parents then siblings take in equal shares.

1.6 If there is a surviving spouse (or Civil Partner) and no surviving issue, parents or siblings or their issue, the spouse takes the entire estate. If there is no surviving spouse, the next of kin take according to the rules of priority.

2.0 WHY SHOULD I MAKE A WILL?

It is important for you to make a will because if you do not, and die without a will, the law on intestacy decides what happens to your property. A will can ensure that proper arrangements are made for your dependants and that your property is distributed in the way you wish after you die, subject to certain rights of spouses/civil partners and children

It is a very foolish to assume that if your next of kin know your wishes that they will sort it out between themselves. Firstly all of your next of kin will need to agree. Secondly, there are often tax consequences that make some arrangements between next of kin undesirable.

If you have a minor child or children i.e. children under the age of 18, then we recommend in the strongest terms that you have a Will to appoint Guardians and Trustees for those children and that proper provisions is made for them.

These issues are dealt with in more detail below.

3.0 WHERE DO I START?

Record the basic information (see questionnaire attached to this leaflet):

- **Your Assets, Their Value and Where They are located**

  It is important that after your death your Executors will have details of all your assets and know where to find bank books, shares/savings certificates, deeds, life insurance policies and all relevant financial information.

- **Nearest Relatives**

  Set out particulars of your immediate family, i.e. the names of your spouse, children or other dependants (including their dates of birth) or otherwise your closest living relatives and their addresses.

- **Executors**

  Choose the person/s best suited to carrying into effect the terms of your Will. An advantage of making a Will is that your beneficiaries avoid the cost of an Administration Bond (this is an insurance policy) which is

required where no Executors are appointed. A minimum of two Executors are recommended and if you are a senior citizen, at least one of those should be younger than you.

- **Proposed Division of Your Estate**

  The usual format is:

  - ❖ Cash legacies (e.g. friends, charities, religious).
  - ❖ Bequests of specific property (e.g. jewellery, furniture, etc.) It may be convenient to deal with these in a letter of wishes coupled with a discretionary power for the Executors appointed in the Will.
  - ❖ Any other special provisions (see "special circumstances").
  - ❖ Residuary bequest (which may comprise most of your estate). Consider the possibility that some relatives/friends may be disappointed and think about any explanation you would like your Executors to give.

- **Minimising potential challenges to a Will after your death**

  There are two categories of challenges to a Will. One is a challenge on the basis that the Will has not been validly executed or there has been some undue influence by a person seeking to benefit himself or somebody else. Providing instructions to a solicitor is one of the best ways to prevent that kind of challenge because he will take careful instructions and create evidential safeguards to minimise this risk.

  The other potential challenge to a Will is under the Inheritance (Provision for Family and Dependants) (NI) Order 1979. This is dealt with in more detail under section 5.00 below. You need to consider very carefully whether your proposed Will makes adequate provision and therefore deters a relevant person from making the claim. Special consideration should be given to a potential claim by Spouses or Co-habitees living as husband or wife. Giving a claimant something to lose by claiming is one kind of deterrent, e.g. making a gift to A provided s/he does not make a claim against the estate.

- **Special Circumstances/Assets**

  Special considerations arise if:

  - ❖ Any of the beneficiaries are under 18 years of age (see "What if I have young children?").
  - ❖ Any of the beneficiaries suffer from a disability (see "Discretionary Trust")
  - ❖ A farm or business is involved or your dwelling house is the main asset (see "No cash assets" and "Discretionary Trust").

- **Funeral Wishes**

  You should inform your family in your lifetime as to what your funeral wishes are, as your Will may not be read until after the funeral. If you wish to have a headstone on the grave, you should state this in the Will.

4.0 WHAT IF I HAVE YOUNG CHILDREN?

You should consider appointing a guardian for your child. A guardian is a person who is charged with caring for your child after you die. However, an appointment of a guardian is of no legal effect (i.e. it does not give him/her legal parental responsibility UNLESS you are a person with sole parental responsibility of a child or children under the age of 18 years.

A mother or a married father will automatically have parental responsibility. An unmarried father of a child does not have parental responsibility unless or until:

(a) He marries the mother; or
(b) He is shown on the birth certificate as the father of the child AND the child was born after 16th April 2002; or
(c) He has a parental responsibility agreement with the mother which is registered in the Court; or
(d) He has obtained a parental responsibility order in the Court; or
(e) He has obtained a residence order.

A non-parent can only have parental responsibility of a child if he or she has obtained a residence order.

There are some circumstances where it might be desirable to appoint a guardian for a child, but where it is no legal power to do so. For example, if you are a foster carer or if you have a disabled adult child who needs looking after. In those circumstances, it is the Court or, in some instances, Social Services, who decides who looks after the child when you die. Nevertheless, it is still recommended that you make a statement as to whom you would wish to look after the child and set out your reasons why. Such a wish will certainly be taken account of by the authorities and can be used as evidence in a court in a disputed case.

- **Trustees**

  You can appoint a trustee to look after the assets in your estate; an Executor can also be a Trustee. Your Will should give your Trustees enough powers to allow them to be flexible in deciding what maintenance and other payments should be made for the benefit of your children.

- **Provision for children**

  You may wish your estate to be divided equally between your children when they reach a specified age. You can arrange for them to receive an

income from the estate, possibly from 18 years of age; alternatively, you may set up a "discretionary trust" for your children until the youngest reaches age 18 (see "What is a Discretionary Trust?"). Alternatively, if the children are likely to stay with a relative, consider enabling your Executor/Trustee to advance money to the new household budget, including allowing for monies for increased mortgage payments on a larger home to accommodate both families.

5.0 WHAT IF I'M SEPARATED, DIVORCED, A PARTNER OR A CIVIL PARTNER?

A separated or divorced spouse or a partner of two years or more are amongst the classes of persons entitled to claim against a deceased's estate under the Inheritance (Provision for Family and Dependants) (NI) 1979. However, the spouse's (or former spouse's) rights may be cancelled under the terms of a court order in a claim for ancillary relief made in Divorce or Judicial separation actions.

In the case of unmarried partners, the "partner" may also have a claim against the estate but such a claim is not likely to be as strong as a claim by a spouse, former spouse or Civil Partner (see below).

For more information on claims under the Inheritance (Provision for Family and Dependants (NI) Order 1979 please refer to section 5.00 below.

On registration of a civil partnership between same sex couples, civil partners are treated in the same way as spouses under the tax and succession codes. A Civil partner has a legal right to a share in their partner's Estate when they die, no matter what that deceased partner may have said or specified in your will. This does not apply to cohabiting couples. In other words, if you are in a cohabiting relationship, there is nothing to prevent you from leaving some or all of your property to your partner in your will.

6.0 THE INHERITANCE (PROVISION FOR FAMILY AND DEPENDANTS) (NI) ORDER 1979

6.1 Who can make a claim?

Article 3(1) of the order lists those who can make a claim for financial provision against the estate. These are as follows:

(a) the wife or husband of the deceased;
(b) a former wife or former husband of the deceased who has not remarried;
(ba) any person (not being a person included in sub-paragraph (a) or (b)) who during the whole of the period of two years ending immediately before the date when the deceased died, was living in the same household as the deceased and as the husband or wife of the deceased;
(c) a child of the deceased;

(d) any person (not being a child of the deceased) who, in the case of any marriage to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage;
(e) any person (not being a person included in sub-paragraphs (a) to (d)) who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased;

Category (b) (a) above refers to unmarried co-habitees who have a relationship similar to a spouse. They must have been living together with the deceased for at least two years prior to the deceased's death.

Under category (c), a child is a child of any age. It does not include stepchildren, but the latter may have a claim under category (d). An adopted child is treated in law as the child of the Adopter.

Category (e) is for any kind of claimant who had a dependency on the deceased prior to his death.

6.2 Grounds for making a claim

The Ground which all claimants have to satisfy is that the provision of the deceased's will or intestacy does not make adequate financial provision for the claimant.

In deciding the adequacy of financial provision, the court has to have regard to the guidelines provided by Article 5. Generally speaking, the court makes a balancing exercise between the financial needs and resources of the claimant and the beneficiaries BUT

(1) when dealing with spouses, former spouses and co-habitees under category (ba) (see section 5.1 above) the court has to also take into account
    (a) the age of the applicant
    (b) the length of the marriage (in the case of spouses or former spouses) or (in the case of cohabitees) the period during which the applicant lived as the husband or wife of the deceased and in the same household as the deceased; and
    (b) the contribution made by the applicant to the welfare of the family of the deceased, including any contribution made by looking after the home or caring for the family; AND
(2) In the case of spouses (who did not have a decree of judicial separation where the separation was continuing at death) the court has to take into account what s/he would have been entitled to on a divorce.

6.3 Is there anything I can do to avoid such a claim being made?

The short answer is generally "no". A lifetime gift is treated as part of your estate unless that gift was made more than 6 years before your death. You may, however, wish to consider making some provision in

your will which may act as a deterrent (see section 2 above on minimising challenges to your will).

7.0 WHAT IF I HAVE NO CASH ASSETS?

If your only asset is a house, business or farm and you do not have sufficient cash, you can leave the house to a particular beneficiary on condition that the beneficiary arranges for legacies to be paid to other beneficiaries. In the case of an elderly brother/sister, you could consider leaving the house, business or farm to them for their lifetime and state in your Will what you want done with the property after their death.

8.0 WHAT IS THE SIGNIFICANCE OF JOINT PROPERTY?

Property held jointly (rather than in separate shares) passes on to the survivor where there is clear evidence that this is intended. However, there are legal rules which may prevent this.

With Bank accounts, it is not unusual to open a joint account for convenience (e.g. where the original account holder is elderly or immobile) or for a specific purpose (e.g. to pay for the funeral). It is therefore important when opening such accounts to specify in writing whether it is intended that the survivor is to keep the money. You should take specific steps to ensure that your intention is clear as to what is to happen to the account on your death.

It should also be noted that a deceased's share of joint property is still treated as part of his estate for Inheritance Tax purposes. Further, joint property forms part of the deceased's estate for the purpose of the Inheritance (Provision for Family and Dependants) (NI) Order 1979 (see section 5.00 above) and can therefore be claimed against.

9.0 WHAT IS A DISCRETIONARY TRUST?

This provides your Trustees with full power to apply capital and income at their discretion for the benefit of your beneficiaries. This may mean that some beneficiaries will receive more than others – that is up to the Trustees to decide. A discretionary trust can be useful where beneficiaries are young, suffer from a disability, are elderly, for a dependant relative and for tax planning purposes for larger estates.

10.0 CAPITAL TAXES

10.1 Inheritance Tax

The tax, which is primarily concerned with death, is Inheritance tax. Put simply, it is a tax against inheritances and has to be paid whether the inheritance is a gift by will or acquired on intestacy. More detailed information about this tax is set out at section 10 below.

10.2 Capital Gains Tax

Capital gains tax (CGT) is a tax on gains made as a result of a disposal of an asset. The mechanism for calculating a taxable gain is complex and outside the scope of this leaflet. Generally, speaking, a gain is calculated by deducting the acquisition value of the asset from the sale value of the asset. When a person dies, there is no CGT payable on a person's estate by reason of the fact that there is a disposal from a gain resulting from the deceased's death. Although CGT is not primarily concerned with death, its inter-relation with Inheritance tax can be significant, particularly when there is a substantial gain in an asset between death and the date of sale. Furthermore, for some individuals, a decision as to whether or not to make a lifetime gift to save Inheritance tax has to be balanced with considerations as to whether CGT becomes payable.

11. INHERITANCE TAX

11.1 When is the tax payable?

The General Rule is that for tax purposes, the deceased's estate is valued at the point of death. Tax must be paid within 6 months of death. Thereafter, interest accrues.

11.2 What part of my estate is taxable?

The deceased's taxable estate is the gross value of the estate immediately before death plus lifetime gifts made within 7 years but less exempt gifts. Annual gifts up to £3,000 per donor are exempt. Note that an interest in joint property forms part of the taxable estate. If the deceased has a lifetime interest in a trust, he is treated as owning the whole of the property in the trust for tax purposes. If the deceased lived in the property that he formerly owned, the whole of the property is usually regarded by the revenue as forming part of the estate for inheritance tax purposes.

11.3 Inheritance tax thresholds

No tax is payable on the first £325,000 of the deceased's estate. This tax-free threshold applies as at 2010/2011 but is subject to change annually, visit www.hmrc.gov.uk for up to date figures.

Above that amount, the estate is taxed at 40% except in relation to lifetime transfers to and from certain trusts which are taxed at 20%

11.4 Exempt inheritances

A distinction needs to be made between exempt inheritances and inheritances which are subject to relief because the nil rate band (£325,000 in 2011) does not overlap with exempt inheritances for the purpose of calculating the taxable

estate (see, for example what we say about tapering relief below at section 10.5.

The inheritance of a spouse who was domiciled in Northern Ireland or the UK at the date of the deceased's death is exempt from inheritance tax and does not count as part of the taxable estate. The first £55,000 of a gift to a spouse living abroad is also exempt.

Gifts to U.K. registered charities; U.K. Political parties (which have a representation in the House of Commons) and museums are also exempt.

11.5 Assets which are subject to relief

Subject to some exceptions, businesses owned by or shares in Companies relating to Businesses run by the deceased, are subject to relief up to 100%

Owner-occupied farmland and tenancies as well as certain let farmland are subject to relief up to 100%. A farmhouse will qualify for agricultural relief provided it is in the same ownership form as the farmland and has been in existence for more than 2 years. There are tests as to whether a property is a farmhouse, such as historical association, geographical comparables and financial viability. Recent case law suggests that the following factors will tend to improve the prospects of a dwelling house qualifying as a farmhouse for agricultural relief:

(1) there is a long history of agricultural use associated with the building
(2) that the farm business is profitable.
(3) Farm buildings immediately adjacent to the dwelling house.

Obviously, each case is decided on its own merits. If you think your home could sell without the land as a valuable asset, it may be that it would not have the benefit of agricultural relief.

Specific Advice should always be taken on the availability of any reliefs.

11.5 Tapering relief

Any asset which is given by the deceased to somebody less than 7 years before the deceased's death forms part of the deceased's estate for tax purposes. Tapering relief is available in respect of a gift which is made between 3 and 7 years of the deceased's death on the following scales:

Years before death	0-3	3-4	4-5	5-6	6-7
Percentage tax payable	100	80	60	40	20

Tapering relief is only going to be of significance if the total gifts, which can be subject to tapering relief, are greater than the nil rate band, i.e. greater than £325,000

11.6 How can the impact of Inheritance Tax be reduced?

It is important to plan the passing of your assets so as to minimise the tax that your beneficiaries have to pay.

Step 1 **Consider whether it is realistic to expect that your estate might be subject to inheritance**. If you can think of no scenario where your estate could be greater than £325,000, then the chances are that your estate will not be subject to Inheritance tax.

Step 2 **Look at the reliefs available**. If you own farmland then the 100% agricultural relief could be of considerable significance.

Step 3 **Look at dividing up your property to use all available tax-free thresholds**. The prospect of a husband and wife dying at the same time or within a month of each other can be anticipated with appropriate will planning and division of assets so that there is effectively two estates which separately take advantage of the nil rate band.

Step 4 **Consider lifetime gifts**, particularly if you expect to live longer than 7 years but balance this with potential capital gains tax liability and priority you make with regard to the loss of control over your assets. Consider discretionary trusts to minimise this loss of control

Step 5 **Consider insurance products.** Consider, for example, an insurance policy to enable the estate to pay Inheritance tax on your death. Another example is in the planning of pension schemes. You may wish to avail yourself of a product which deems the fund accumulated as not being part of your estate. In that case, the pension trustees pay the beneficiaries nominated in the policy. A discussion of the various insurance devices available is outside the scope of this leaflet and you would be recommended to take advice from somebody professionally qualified to give independent financial advice.

Disclaimer: The information herein is intended as a general guide only. No responsibility is accepted for errors or omissions howsoever arising.

Morgan McManus
Solicitors
Law Chambers
The Diamond
Clones
Co. Monaghan

Updated FMM August 2011

INSTRUCTIONS FOR MY WILL

(This should be completed to give an overview of the value of your estate and your wishes. Precise details of each asset are not required)

PERSONAL DETAILS

Full Name ----------

Address ----------

Occupation ----------

Date of Birth ----------

PPS Number ----------

Instructions in relation to burial ----------

EXECUTORS AND TRUSTEES

Name ----------

Address ----------

Name ----------

Address ----------

Name ----------

Address ----------

Children

Name ---------- Age ----------

Name ---------- Age ----------

Name ---------- Age ----------

Other dependants, e.g. co-habiting partner, aged parent or handicapped relation:

Guardians of infant children

DETAILS OF ASSETS

House **Value £**

Contents (insurance value) **Value £**

Bank/Building Society accounts **Value £**

An Post **Value £**

Business **Value £**

Pensions **Value £**

Life Insurance Policies **Value £**

Other Property (e.g. stocks or shares) **Value £**

SPECIFIC DEVISES OR BEQUESTS

Beneficiary ---------- **Property ----------**

Beneficiary ---------- **Property ----------**

PECUNIARY LEGAIES

Beneficiary ---------- **£** **----------**

Beneficiary ---------- **£** **----------**

RESIDUE OF ESTATE

Beneficiary ----------

Name of Stockbroker/Accountant ----------

Specify any assets (including house) that you hold jointly ----------

---

Which of your beneficiaries have received or are likely to receive other benefits?

Location of title deeds or share certificates

Morgan McManus
Solicitors
Law Chambers
The Diamond
Clones
Co. Monaghan
00 353 47 51011