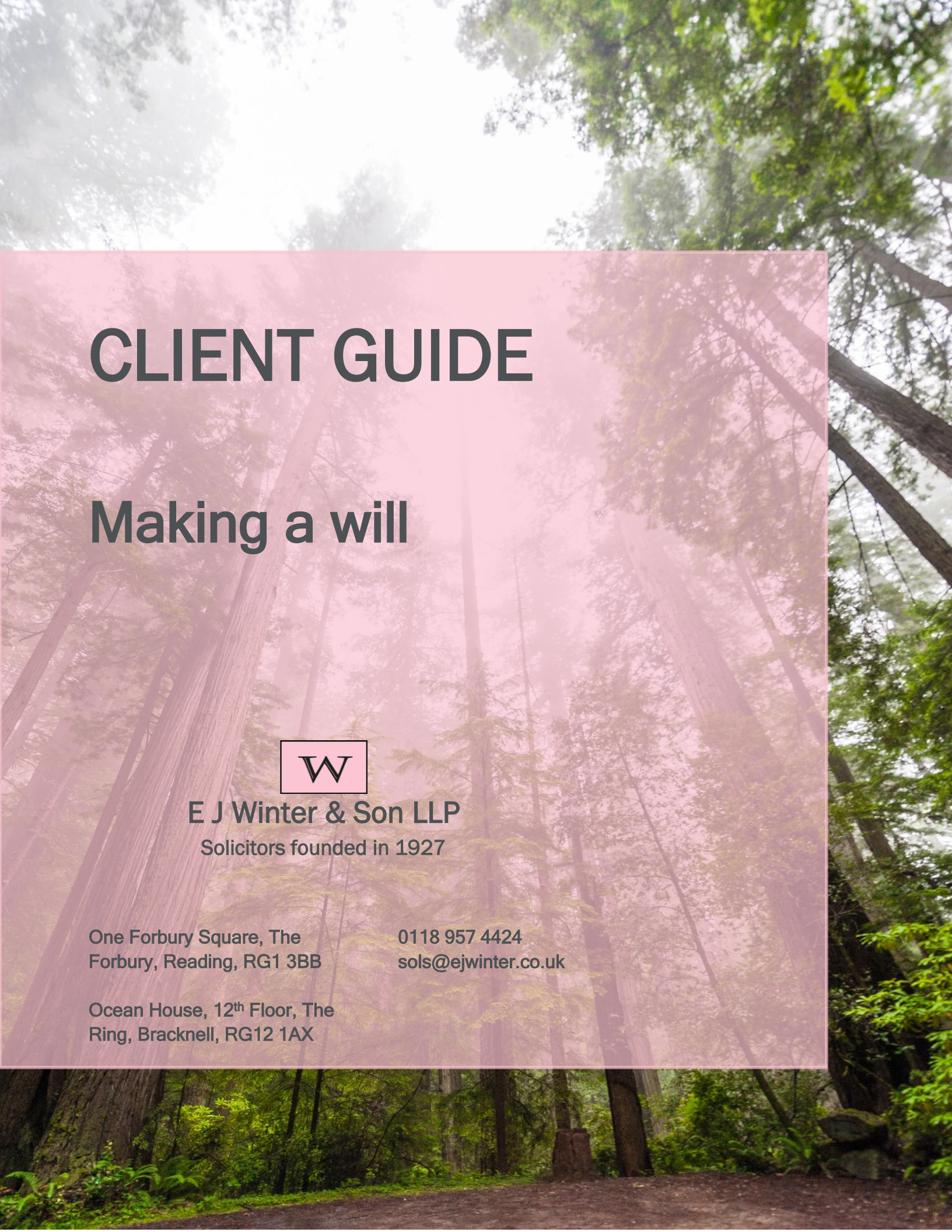

CLIENT GUIDE

Making a will

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Making a Will

What is a Will?

A will is an expression by a person of his or her wishes, which is intended to take effect only at his or her death. A will has no effect until the person whose will it is ('the Testator') dies. It can be revoked by the Testator or by the Testator's actions at any time until his or her death.

Under the law of England and Wales, a will must be signed in accordance with the *Wills Act 1837* (as amended by subsequent Acts). In order to be valid, a will must be:

- Made by a person who is 18 years old or over.
- Made voluntarily and without pressure from any other person.
- Made by a person who is of sound mind.
- Made in writing.
- Signed by the testator in the presence of two witnesses.
- Signed by the two witnesses, in the presence of the testator (and in the presence of each other), after the testator has signed the will.

A witness, or the spouse or civil partner of a witness, cannot benefit from the will. If a witness of the will is also a beneficiary (or the spouse or civil partner of a beneficiary), the will is still valid, but the beneficiary will not be able to inherit under the will.

What if you die without a will?

If you die before making a will, or without having made a valid will, the rules of intestacy deal with the distribution of your estate. Please see our separate guide on intestacy for more information about this.

A will is one of the most important documents a person makes during their lifetime and we therefore strongly advise that clients take professional advice from a specialist before making their will.

As solicitors we are fully qualified, regulated and insured to advise clients on the preparation of their wills.

What will we consider when making a Will?

When assisting a client with their will, it is not sufficient to simply ask who they wish to benefit. As specialists in this area, we always consider each of the following specific points when taking instructions from our clients:

Previous Wills

It is important that previous wills are considered, particularly where the Testator is looking to cut someone out of their will. Considering the client's previous will and keeping suitable notes as to why they are now changing the will is of significant benefit where anyone seeks to challenge the terms of the will in the future.

There is also a small chance that the Testator's previous will was what is known as a mutual will, potentially preventing them from changing their will.

Marital status

Many clients are not aware that marriage revokes their will unless it is made in contemplation of marriage. We therefore check if a client has plans to marry a specific person (however remote) and draft the will accordingly where this is the case.

Unlike marriage, the effect of divorce on a will is to treat the Testator's former spouse as having died before them. We still however strongly advise that clients review their wills as a priority following any divorce, rather than

simply relying on this statutory provision. Clients should really look to change their will as soon as the divorce process starts, as their spouse is not treated as having died before them until the decree absolute is granted, which is at the end of divorce proceedings.

Who is present at the meetings

Clients should always be seen alone where possible to ensure that they are not under any pressure or undue influence to make their will. Notes should be kept setting out exactly who was present at the time the will was made in case this is called into question in the future.

Capacity

A client must have capacity to make a will and as part of the process, this is something we always consider and record accordingly.

Where we have any doubts, the golden rule is to seek an opinion from a medical professional to ensure that the client is able to make a valid will.

Assets that may not pass by the will

A will does not always deal with all of the Testator's assets and it is therefore crucial that we identify which assets may not pass in accordance with the terms of the will when taking instructions. We have provided some examples below of assets which may not pass under the terms of the will:

- Jointly owned assets assets can be held as either 'Joint Tenants' or 'Tenants in Common'. Assets held as Joint Tenants pass by survivorship to the surviving joint tenant(s) no matter what is stated in the will. The Testator's share of assets held as Tenants in Common pass in accordance with the terms of their will or if they do not have a will the intestacy rules. It is possible to change from one form of ownership to the other depending on what the intention is and this is something we would be happy to assist with.
- Life insurances are often written in trust as this can be more tax efficient. Death in service policies through work are almost always provided on this basis. Where a policy is written in trust, the providers of such policies need a nomination form or expression of wishes signed by the client to guide them on who to benefit when they die. The proceeds of such policies generally do not form part of the client's estate and therefore do not pass under the terms of his or her will. Clients should ensure that they have completed a suitable nomination to deal with these after their death.
- Pensions are generally held by pension trustees. As the Testator is not the legal owner, they are normally unable to pass these on under the terms of their will. Instead, they need to review matters with their pension providers to ensure that arrangements are in place so that the uncrystallised pension pot passes to those they want to receive it after their death in the most tax efficient way possible.
- Business assets often need to pass in a specific manner as detailed in either a partnership agreement or company memorandum. Care needs to be taken to ensure that the Testator's will does not conflict with any such provisions contained in these documents.

Foreign assets

We always consider whether a client has any assets overseas and whether arrangements have been made in the country where these assets are situated. Care must be taken to ensure that the English will does not revoke any foreign

will that may be in place or conflict with its terms. Advice should generally always be taken in the country where the assets are situated, since as English lawyers, we are unable to advise on legal matters arising outside of the jurisdiction with which we are qualified to advise on.

The EU has what are known as the Brussels IV regulations, which potentially enable a Testator to make a choice of law, choosing the law of England & Wales to deal with succession of their assets in the EU. This can be an option where forced heirship would otherwise cause problems for them, or where it is not possible for the Testator to make a will in that country – or where, despite our advice, the client chooses not to make a will in that country.

Domicile

Domicile is an important and complex consideration for tax purposes. Where a Testator is domiciled has a significant impact on the inheritance tax that they pay. Those domiciled in England & Wales generally pay inheritance tax on their worldwide assets, whilst those domiciled overseas generally pay inheritance tax only on their assets that are situated in England and Wales.

Those with non-domiciled spouses generally have a limited spouse exemption of £325,000. Those with UK domiciled spouses have an unlimited spouse exemption.

Domicile is a complex area. As a rough guide you are generally deemed to be domiciled in the country where you have lived for at least 15 of the last 20 years leading up to your death. This is not always the case and it is possible to make an election of domicile – although any such election needs careful consideration before being made. Please see our client guide on domicile, which provides some additional information on this complex area.

Inheritance tax

We always consider where our clients roughly stand for inheritance when assisting them with their wills. Where we identify inheritance tax as a concern for them, we discuss basic planning options and are able to recommend specialist financial advisors or accountants who may be able to assist them with this area further.

There may be tax efficient options for Testators who own assets that qualify for Business Property Relief or Agricultural Property Relief. It is possible to use these reliefs to leave these assets to a relevant property trust, which generally has a much more lenient rate of inheritance tax than individuals.

Please see our client guides on Inheritance Tax, the Residence Nil Rate Band and Exclusions, exemptions and reliefs, which provide you with a general overview of this area.

Lifetime gifts

It is important that lifetime gifts are considered, since these have a bearing on the available nil rate band for inheritance tax purposes and how and by whom the tax is to be paid.

Loans

If a Testator has loaned money to anyone, this needs to be considered when drafting their will. Attention needs to be given to whether the loan is to be forgiven on death or whether the Testator wants their executors to call in the loan on death.

Funeral wishes

Although funeral wishes are not legally binding, we recommend that Testators always include these in their wills. As a minimum they should state if they wish to be buried or cremated, as this can take a difficult decision away from their

family or friends who may not otherwise have been aware of the Testator's wishes.

A Testator can go into as much detail as they want to so far as this is concerned, including locations, flowers, charitable donations etc.

A will can also include details about organ donation, however clients should be aware that it is often too late for this by the time their will is located. Clients should ensure that they have registered their preferences on *organdonation.nhs.uk* during their lifetime. You now have to opt out if you do not wish to donate your organs.

Executors

The executors are those with legal authority to deal with the administration of the Testator's estate.

Their role is to collect in assets, pay the funeral expenses, testamentary expenses, any other liabilities, specific gifts and then deal with the distribution of the residuary estate (the net estate remaining after payment of the above items).

Where there are minor beneficiaries, or the will creates any form of trust, the executors may also act as the trustees of these trusts unless the will states otherwise. This means that they are responsible for holding and dealing with these assets on behalf of the trust.

Executors need sufficient powers to carry out their role effectively. We include a comprehensive set of administrative powers in all of our wills to enable them to do so. It is generally far better to give them more powers than they may need than not enough.

Minor children

Where the Testator has children under 18, consideration needs to be given to what age they should benefit at and who will act as their guardians. The default position is that the child or children will take at 18, but parents may wish to delay this by using an 18-25 trust.

We include powers to enable the trustees to use the assets to benefit the children should this be necessary before they reach the age at which they stand to inherit.

Guardians

It is crucial that those with minor children state who is to be appointed as their guardian(s) should anything happen to both parents before their children reach 18.

Where a will does not correctly appoint guardians, the court must make this decision. This can be a slow process, during which time children can be placed with an approved foster family. By making a valid appointment of guardians in a will, the need to involve the court and potentially foster parents is avoided.

Specific gifts

A will does not need to include any specific gifts, although a Testator may wish to include these where they wish assets to pass to beneficiaries other than those receiving the residuary estate, or where they want specific items to pass to specific beneficiaries.

It is possible to make specific gifts of money, personal items, property and business assets.

Where a couple are making specific gifts, thought needs to be given to whether these will take effect on the first or the second death.

Where a married couple makes specific gifts to a non-exempt beneficiary on the first death, this can have implications on the transferrable nil rate band for inheritance tax purposes on the second death as some of the first to die's nil rate band will have been used already.

Clients often like to gift personal items such as household contents, jewellery, paintings etc using

an informal note. Their will needs to leave these items to the executors or a specific person to distribute in accordance with this informal note. This enables them to update the note in the future without having to update their Will. It is only possible to use this type of structure for personal items. Cash, property and business asserts cannot be left in this manner.

Children from previous relationships

Many clients have children from previous relationships. Where this is the case, they often want to provide for their partner or spouse for life, whilst at the same time ensuring that their assets will pass to their children on their partner or spouse's subsequent death. The use of a properly worded life interest trust or discretionary trust achieves this.

Care fee planning

Where a testator is worried that their assets may be used to fund their spouse or partner's care, they can again consider using a trust, such as a life interest trust or a discretionary trust to enable their assets to be used to benefit their partner or spouse, whilst at the same time protecting them from being exhausted funding their care and counting towards their means testing.

Beneficiaries divorcing or in financial difficulty

Testators looking to benefit those who may be at risk of divorce or bankruptcy should consider ring fencing that beneficiary's share in a suitable trust. This is also useful for vulnerable beneficiaries who may be taken advantage of if they come into a large sum of money.

Disabled beneficiaries

We are able to draft wills to include specialist trusts used to benefit disabled beneficiaries. These have significant tax advantages over other trusts, whilst ensuring assets are applied correctly for the benefit of the disabled beneficiary. They are carefully drafted to cater for as many eventualities as possible, even including things such as enabling funds to be used to pay for a carer to go on holiday with the disabled beneficiary, which any other type of trust would generally not allow.

Pets

Where a Testator has pets who survive them, they can state in their will who should look after these animals and may wish to consider leaving this person a lump sum of money to assist with the likely costs such as food and vet bills.

Charities

Testators may wish to benefit charities in their wills. Charities are exempt from inheritance tax, so this can help to reduce the overall amount of inheritance tax payable.

Those who leave more than 10% of their taxable estate to charity also benefit from a reduction in the rate of inheritance tax from 40% to 36%.

Residuary estate

The residuary estate is everything left over after payment of specific gifts, funeral expenses, liabilities, testamentary expenses and inheritance tax.

A simple will may not contain any specific gifts, instead simply leaving all of the residuary estate to a spouse and then to children in equal shares.

The residuary estate can also be divided in unequal shares between a number of beneficiaries with reference to percentages or fractions if this is preferred.

Consideration should always be given to who should benefit if any of the residuary beneficiaries die before the Testator. Clients generally want their share to either pass to that beneficiary's children or remoter descendants or to the surviving original beneficiaries.

Where the residuary estate is divided between exempt and non-exempt beneficiaries, for example children, friends, charities and spouses, it is important to specify if the shares are shares of the gross estate before the payment of inheritance tax or shares of the net estate after the payment of inheritance tax, otherwise significant problems can arise with regards to who pays the tax.

Disgruntled potential beneficiaries

Where the testator is aware of people who may look to challenge the terms of their will, they should consider leaving a signed statement with their will setting out the reasons why they have not provided for this person. This can be produced should the estate be challenged after the Testator's death.

Testator's health

It is recommended to keep a record of the Testator's health at the time they made their will, just in case someone alleges that they did not have capacity to make a will at the time they signed it. This is a question we always ask and keep a record of when making a will.

Further help

For further information, see:

- *https://www.ageuk.org.uk/information-advice/money-legal/legal-issues/making-a-will/*
- *https://www.lawsociety.org.uk/en/public/for-public-visitors/common-legal-issues/making-a-will*

Alternatively, please don't hesitate to contact a member of our private client team:

One Forbury Square, The Forbury, Reading, RG1 3BB; and

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