The importance of making a Will

2010 continues to be a volatile and troubled year and with that uncertainty in the world, it will pay to create certainty at home. Only 50% of us who should be making a Will, do and many people misunderstand intestacy, write Patrick Hurd and Michael Jepson of Pitmans

Is the following acceptable for your Will?

- If my spouse/civil partner survives me he/she gets all my personal possessions and the first £250,000 of my estate plus a life interest (interest in income only) in half of the rest. The other half is to go to our children as and when they attain the age of 18 or on earlier marriage.
- If he/she survives me but I have no children he/she gets personal possessions and the first £450,000 of my estate plus half of the rest. The other goes to my parents or brothers and sisters.
- I do not appoint anyone as my executor but my spouse/civil partner and my family can sort out who is to apply for a grant.

Now, if you have not made a Will, then that is your Will, as that is a basic summary of the main intestacy provisions.

The Government has issued a consultation paper on intestacy so that even if the above were acceptable now, any new provisions would apply after 2011. Would you want to leave it to the Government to update your Will?

Intestacy arises when the deceased did not make a Will or revokes it.

Marrying or entering into civil partnership revokes a Will unless it makes specific reference to an intended marriage. Alternatively, the Will may be invalid.

Certain assets are excluded from intestacy, namely those held jointly, which pass by survivorship ie joint tenancy (as opposed to tenancy in common of property) when it passes automatically to the survivor outside the Will/intestacy, for example property and joint accounts. Life insurance policies are often written under trust when they also pass separately.

You can avoid intestacy by making a Will. It is often straightforward becoming more complex where tax and cross border issues exist. Incorporating a trust into a Will is an important consideration, for example where minor children are involved or dealing with a second marriage. It needs to be remembered that if there is a beneficiary who is dependant on the deceased, for whom proper provision has not been made, then claims can be made under Inheritance (Provision for the Family and Dependants) Act 1975.

People generally think of inheritance tax when thinking about Wills. There is a (currently frozen) nil rate band limit of £325,000. Above that inheritance tax is payable at 40% on the whole of the excess.

There is, of course, exemption between spouses and civil partners for property passing to the survivor so that the transfer will be exempt from IHT even if the value is in excess of nil rate band. Where one spouse is not domiciled in the UK, there is a significant inheritance tax restriction which needs to be provided for. Complexities arise where foreign assets are involved, particularly overseas land which is always subject to local rules and taxation.

Patrick Hurd, consultant

Since 2007, the Government has permitted one spouse's unused nil rate band to be transferred on the first death to the other. Importantly, this is at the level applying on the second death. This is an important entitlement, but it is not always the case that spouses will want to organise their affairs to maximise the amount that can be transferred to the survivor. For example, where property is likely to grow in value faster than the nil rate band threshold increases, it may well be preferable for that property to be put into a nil rate band discretionary trust at the outset, so as to use up the nil rate band.

Agricultural (APR) and Business property relief (BPR) are vital reliefs as assets and property which qualify can get 100% or 50% relief from IHT. BPR applies to any unquoted (except for AIM) shares in a qualifying (broadly, non investment) company or unincorporated business, which has been owned for two years. These assets can pass straight into a trust on the first death and the surviving spouse can be included as a beneficiary, but without the interest forming part of his/her estate. This exemption may well be lost (because the business may be sold or the relief wholly or partially withdrawn by the Government) if not used as part of the planning for the death of the first spouse.

Circumstances may permit additional planning to secure an effective further deduction on the second death through careful, but straightforward planning, involving the purchase of business assets from the trust.

Where business property is held, more detailed provisions are needed in the Will to take full advantage of the reliefs. Clients whose businesses are carried on in partnership, need to be aware of a trap in that BPR can be denied on the death of a partner where the remaining partners have implicitly or expressly agreed to buy out the deceased partner's share of the business, possibly through insurance policy arrangements. Clients need to review their partnership agreements in this respect.

Michael Jepson, consultant

Combining the use of BPR with capital gains tax holdover reliefs and the possibility of using lifetime trusts, instead of a Will, to provide for succession to family businesses can prove a compelling tool.

There is much that clients can do to minimise the tax burden by taking advantage of reliefs which the Government have introduced. This represents legitimate tax mitigation, not avoidance, itself now a perjorative term.

Details:
Patrick Hurd 020-7634-4634
phurd@pitmans.com

Michael Jepson 020-7634-4637
mjepson@pitmans.com
www.pitmans.com/private-tax-family-business

pitmans
MAKING IT HUMANLY POSSIBLE