"You don't need to be at death's door to appreciate this one...Who knew the law could be this interesting?" - *MFP Wealth Management*

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Wills, Probate & Inheritance Tax

Includes Final Wishes Repair Kit

The Zero Tolerance Approach to Misinformation.

Paul Solomons

With a Foreword by **John Stone,** author of ***These Are The Final Wishes Of...***

Foreword

Many people have heard the expression “Solomons Law” which originates from the Bible, but not many people know its narrative.

The **Judgment of Solomon** refers to a story from the Hebrew Bible in which King Solomon of Israel ruled between two women both claiming to be the mother of a child.

It has become a metaphor referring to a wise judge who uses a stratagem to determine the truth, tricking the parties into revealing their true feelings for the disputed child, thus revealing the real mother.

So what better name for a law firm than *Solomons Law?*

When the man that runs and owns it is called Paul Solomons how could one expect anything else?

I met Paul Solomons many years ago. What struck me was determination that his clients, friends and acquaintances should all be aware of personal family laws and how they affected everybody. He didn’t do this just to get clients, (although he has a fair few!) but because he couldn’t bear seeing people whose lives had been turned upside down for lack of “simple paperwork”.

From the parents of children who both died in an accident without naming guardians for their children; to the man who was buried when his wishes had been to be cremated.

This is why I support Paul Solomons and his endeavours to banish the fog of misinformation that exists within personal family law. There are just too many solicitors relying on technical, archaic and incorrect interpretations when it comes to dealing with tax, probate and wills.

With this book, he has invested his time and effort to help people. Whether he gets any clients from it really isn’t the point. And that’s exactly what I’d expect from him.

A wise judge who delivers the truth.

Or in other words...*Solomons Law.*

John Stone – www.TheseAreTheFinalWishesOf.com

Introduction

Are You Planning For the Care, Comfort and Well - Being of Your Family After You’ve Gone?

Maybe you’ve gone through life having built up a business. Or perhaps you have assets such as property and savings that you want to leave to your children or other loved ones.

You may even have prepared a Will...

Not making a Will is almost unforgiveable and should be corrected immediately. As a solicitor I’ve seen too many families suffer because the deceased did not make a will. That’s one reason for me writing this book.

But many uniformed people think that their Will is the best document or the only way to ensure loved ones inherit all the family wealth. Guess what...your Will might not be good enough.

“Why not?” I hear you ask?

Some people have used Will Writers, who may have made mistakes. Some people have used online Will services, that are templates and not specific to the individual. Some people have used solicitors who don't really understand the options available to reduce Inheritance Tax and haven't got the experience to do it right for you.

But you've already taken the first step to be one in a hundred thousand.

The type of person who is prepared to deal with reality when it comes to planning for the care, well-being and comfort of your family. Reading this book is your starting point.

And if you have any questions at all once you have read it, I'd be happy to help answer them. You'll find a gift certificate in the back of this book entitling you to receive a consultation with my firm.

Wills And Probate Guide

It is easy to put off making a will. However, this is the only way to guarantee that your money goes to who you want it to upon your death. If someone dies without making a will they are said to have died intestate. If a will is made before someone's death then everything will be normally be distributed with ease. Should a will not be made however, the laws on intestacy will apply.

It is important before making a will to consider exactly what you wish to include in it and who you want to benefit from it. Financial assets such as the home, money and possessions are advised to all be included with clear statements of who will receive each; especially for example if there is a special item that you want to specifically leave to someone. If you have children under eighteen you can also make provisions for them and state who you want to care for them should you die.

The laws on intestacy provide that should someone die intestate and they have a spouse or civil partner and children then they can inherit up to £250,000 of the remaining estate. If there is a remaining spouse or civil partner and parents or siblings but no children then they can inherit up to £450,000 of the estate. Smaller estates will be inherited in full.

These statutory legacies only apply when the state exceeds the minimum value of that prescribed by law. The statutory limits applied to estates exceeding the minimum permitted are as follows:

1. If there is a husband, wife or civil partner, and children:

• The spouse/partner gets the personal chattels, the first £250,000 and a life interest in half of what is left

• The children of the deceased, including illegitimate and adopted children, share between them half what is left straight away, if they are 18 or over; and the other half when the surviving parent dies.

2. If there is a husband, wife or civil partner, and relatives but no children:

• The husband or wife gets the personal chattels, the first £450,000 and half what is left.

• The parents of the dead person, or if they have died, the brothers and sisters or their descendants, share the other half of what is left.

3. If there is a surviving husband, wife or civil partner, but no other relatives:

The surviving spouse/partner gets everything.

4. If there are children, but no living husband, wife or civil partner:

The children share everything equally.

5. If there is no husband, wife, civil partner or children:

Everything goes to the next available group of relatives.

6. If there are no available relatives:

The entire estate goes to the Crown.

Inheritance tax must be paid on all estates valued at £325,000 or more. However, spouses, civil partners and donations made to charities are exempt from inheritance tax. Other exemptions are gifts up to a certain value to those marrying or having a civil partnership, gifts of £250 to individuals (a total gift allowance of £3000 a year is permitted) and any gifts made seven years or more prior to the death of the person making the gift are normally tax free.

Also where the deceased owned a business, farm, woodland or National Heritage property, some relief from Inheritance Tax is available. If inheritance tax is applicable it is payable at 40% on any amount above this.

It is also important to note that should you make a will prior to marriage or a civil partnership it becomes invalid upon that marriage or civil partnership. If therefore you wish for your assets to pass to someone other than your wife or husband or kids and so forth a new will must be made.

If you and your partner never marry but cohabit the situation can become more complex depending upon whether a will has been made or not. If it has then the process is simple. However, if a will has not been made then unlike with married couples and civil partners the deceased's assets will not automatically pass to the remaining partner.

This can come as a shock to people and it is important to be aware of this and to make a will setting out what you and your partners wishes are should one of you die. Another option is to set out a trust agreement as either tenants in common or joint tenants.

Assets that are held jointly such as joint bank accounts will normally follow the joint tenants trust process and automatically pass to the surviving partner. However, once these types of assets have been dealt with any residual assets will pass to other people in accordance with the rules on intestacy.

All is not necessarily lost however, as an application to the courts can be made under the Inheritance (Provision for Family and Dependants) Act 1975.

An application can be made by a surviving dependant if they are someone who the deceased person would likely have made provisions for had they not died intestate.

A claim will be permitted when the surviving cohabitee had been living with deceased as if they were married or civil partners for two years prior to their death or if the remaining partner was being completely provided for or partially provided for by the deceased just before their death.

The courts have considerable powers to determine what money or assets should be passed to the remaining partner and will choose what if any provisions should be granted to the applicant. If the surviving partner is successful in their claim they will not be exempt from Inheritance Tax as a spouse or civil partner would be.

It is often thought that upon someone's death their will must be executed in accordance with their final wishes as stated within that will. In fact if everyone who is to benefit from that will agrees to a

change or changes then they can be made. In order to do this however, an application must be made within two years of the person's death.

Provisions of the will are changed in this way using a Deed of Variation (also known as a Deed of Family Arrangement). Originally this type of legal document was introduced in order to protect dependants who would otherwise be left unfairly deprived by a will. In reality these arrangements are mostly used to reduce Inheritance Tax.

Anyone who would have benefited from the deceased's will and who will lose entitlement to the affected part of the deceased person's estate must sign to agree to this on a Deed of Variation which is set out in writing. If any of the beneficiaries are under eighteen then the courts approval may be needed before a Deed of Variation can be made.

Understanding tax and wills can be really difficult. It is always best to seek advice in relation to any aspect you are unsure of rather than wait for nasty surprises to emerge in the future. What is certain is that making a will is highly desirable and is not something that should be put off.

What Is Probate?

Probate is a word that you don't usually come across until someone passes away.

Probate basically means "the right to deal with a deceased person's estate."

In many cases this will be an executor who has been named in a Will. But if there isn't a Will someone close to the deceased could apply to administer the estate.

Probate covers both application to administer the estate and all the official forms that give executors the right to deal with the deceased's affairs.

What Happens When You Are Granted Probate?

If you are granted probate you have to keep to the wishes in the deceased's Will. This means dealing with all of the deceased's assets, specifically the property, money and personal possessions.

The grant of probate can be used to prove that the individual has the right to do these things.

If there is no Will, (and the person dies "intestate") then the estate is administered according to the laws of succession. In these cases, individuals who are granted letters of administration have the authority to deal with the deceased's estate. However, these individuals are not able to simply do what they wish with the deceased's estate.

What is a Grant of Confirmation?

A grant of confirmation is the term used in Scotland. If the deceased lived in Scotland, a grant of confirmation is then applied for in relation to probate.

Is a Grant of Probate Required for All Estates?

No. It isn't necessary for all estates. If the deceased leaves less than £5,000 and all of their possessions were jointly owned with someone else (and therefore pass directly to the co-owner) then a grant of probate may not be needed.

To find out if the estate meets these requirements, the executor/administrator should write directly to each institution such as bank, building society etc and include copies of the death certificate and Will in order to get information about the deceased's assets.

When Is Probate Granted?

Probate isn't granted to the executor/administrator of an estate until some, and possibly all, the inheritance tax is paid on the estate. This is where a professional valuer or chartered surveyor is able to help with valuing the estate (mainly the property) to work out how much tax will be payable. A solicitor is helpful with this process.

What Happens if There Is More than One Executor?

As many as 4 named executors may apply for a grant of probate. They can work together to execute the estate. However it is often preferable if one executor applies for the grant of probate to sort out the Will on their own. It often simplifies things if it is done this way.

Who Can Help With You With Probate?

A solicitor can apply for a grant of probate on behalf of the named executor.

Many solicitors specialise in probate and their experience is invaluable. Of course, you will pay for their services. Make sure you ask about how much it is likely to cost before engaging the solicitors. (Don't go for the cheapest though, do some thorough questioning about exactly how they work so you feel comfortable with them).

When someone passes away in reality the immediate practicalities are more important than the process of applying for Probate or Letters of Administration.

What If There Is A Will?

If the person who has passed away leaves a will, it will ordinarily name one or more people to act as the executors to administer their estate.

If the deceased held stocks or shares, insurance policies, or property and/or land held in their name (or as tenants in common) then a grant of probate will very probably be needed.

If you are named as an executor of a will you might have to apply for a grant of probate.

A grant of probate is the official document the executors need to administer the estate. It is issued by a section of the court known as the probate registry.

And If There Is No Will?

If there is no will, the deceased has died "intestate" and the process is more complicated.

The Administration of Estates Act 1925 sets out who can act as an administrator – that is, who has the legal right to deal with the affairs of the person who has died.

The administrator is normally a close relative of the person who has died, if there is one. There could be more than one person who has an equal right to do this. Anyone who has this right can apply to the probate registry for a grant of letters of administration. This is an official document, issued by the court, which allows administrators to administer the estate.

In some instances, e.g. when the person who inherits is a child, the law says that more than one person must act as administrator.

Here are some legal terms you may read about that you might want explaining.

Who are Personal representatives (PR's)?

This means executors or administrators. If there's more than one Personal Representative, they must work together to decide matters between them. Disagreements between personal representatives can cause delays.

What is a Grant of Representation?

This includes grants of probate (when there is a Will) and Grants of Letters of Administration, (when there is no Will). Often people simply refer to Probate even if there is no will.

When a Grant of Representation is needed?

When a grant of representation isn't required.

There are two reasons why it may not be needed.

1. If the deceased has left an estate worth less than £5000 in total
2. If the deceased owned everything jointly with someone else

And in some financial organisations, e.g. banks and building societies, they might pay funds to a personal representative without grant of representation – it never does any harm to check!

When a grant of representation is required.

It's more common for a grant of representation to be required nowadays.

A grant of representation is required....

If the deceased left:

- more than £5000;
- stocks or shares;
- a house or land;
- certain insurance policies

How Do I Get A Grant of Representation?

There are a number of ways you can get it. You can apply for a grant in person at The Principal Registry (Family Division) at the London Probate Registry or a District Probate Registry in cities and many large towns.

If you apply in person, you will have to go for an interview at the registry and fill in an application form and a tax form. There is a fee for this.

You can ask a solicitor to apply for the grant of representation on your behalf.

It's important to work with experts in this field, so that they can quickly and sensitively help you with the estate administration. A solicitor's role is to assist you with any probate matter.

What are the Responsibilities of personal representatives?

Personal representatives are responsible correctly administering the estate.

If there is a will, the personal representative makes sure that the wishes in the Will of the deceased person are followed.

If there is no will, you have to follow the rules of intestacy (set out in the administration of Estates Act 1925).

Personal representatives are responsible for finding out if inheritance tax is due as a result of a person's death. If it is, the personal representative has to ensure that it is paid to the Inland Revenue (Capital Taxes Office).

How is Inheritance Tax calculated?

There are a number of factors which affect Inheritance Tax. These can include;

- how much the property and belongings of the dead person were worth when they died;
- the value of any gifts that they gave before they died, and to whom they gave those gifts;
- the value of certain trusts from which the dead person benefited; or which people benefit under the will or under the rules of intestacy (the beneficiaries).

How Long Does Grant of Probate Process Take?

It's not uncommon for the whole process to take up to 12 months. People's estates can be complicated

There are large numbers of organisations involved in the process, for example banks, building societies, insurance companies and the Inland Revenue.

An estate cannot be dealt with until every claim on it has been received.

And even then, individuals have six months from the date when probate was granted to make new claims against the estate.

Things that affect the speed of the process are:

- Were the deceased's financial affairs in order and well-documented?
- Did the deceased own a business or farm?
- What was in the Will?
- Are there any legal disputes that have arisen?
- Does inheritance tax have to be paid?
- Have Inland Revenue files been closed and income tax, benefits agencies and pensions been sorted out?

Family arguments and disagreements between executors and personal representatives can also delay settling the estate.

Potentially Exempt Transfers (PET's) and Inheritance Tax.

Potentially Exempt Transfers (PETs) - are gifts made during your lifetime, exceeding the annual gift allowance of £3,000 but within the Nil Rate Band.

Provided the donor survives for a further 7 years, no tax will be payable and the gift becomes a PET.

In the event of death within the 7 years however, tax will be payable but if this occurs after 3 years, taper relief is available, thus reducing the amount of tax due.

A PET can be a highly effective way of reducing your IHT liabilities while simultaneously ensuring that your assets are passed to your intended beneficiaries.

Who Can I Give These 'Gifts' To?

During your life time it is possible to give a number of gifts away that are exempt from IHT. There are a number of people (beneficiaries) who can receive these exempt gifts;

Husband, wife or civil partner (even if legally separated) owning a UK home

- UK Charities
- UK Political Parties
- selected National Institutions

What Gifts Are Exempt?

Some gifts are exempt from Inheritance Tax because of the type of gift or the reason for making it.

These include:

· Wedding / Civil Partnerships Ceremony Gifts

· Annual Exemption

· Small Gifts

· Normal Expenditure Gift

These gifts can be given during your lifetime or left as a wish in your Will.

Who Pays Inheritance Tax?

The 'personal representative' (the person nominated to handle the affairs of the deceased person) arranges to pay any Inheritance Tax that is due.

You usually nominate the personal representative in your will (you can nominate more than one), in which case they are known as the 'executor'.

If you die without leaving a will a court can nominate the personal representative, in which case they are known as the 'administrator'.

Can I Save Inheritance Tax In My Will?

The answer is almost certainly yes if you are over the £325,000 threshold.

The best thing to do is to call me so that I can discuss with you all your options concerning Inheritance Tax.

Everyone's situation is different.

But one thing is common with most people. No one wants to leave 40% of their estate to the taxman.

When Estate Assets Fall In Value After Someone Has Died What Happens?

When an estate includes assets whose values can fluctuate, such as shares or property, a situation can arise where the value of an estate for Inheritance Tax (IHT) purposes is greater than the market value later on. This is currently one of the biggest problems facing executors, since as the recession progresses, most assets other than cash are falling in value.

Where assets are disposed of at a loss within twelve months of the death of the testator (the legal term for the person who left the will), IHT relief is available. This works as below, but note that the relevant date is twelve months after the death, not after probate is granted: a powerful incentive to make sure that the administration of the estate is progressed with reasonable speed.

If the assets which have lost value are quoted shares, a claim can be made on their sale, but not on a transfer. If the assets consist of land, the time period for a claim is four years from the date of death. The loss claim can only be made by the 'appropriate person' (in most cases the executor) and therefore any asset transferred which is then sold at a loss will not qualify for relief. A claim cannot be made unless the loss is at least 5 per cent of the value at the date of death or £1,000, whichever is greater.

There is clearly room for tax planning here, not only regarding the timing of transfers but also whether assets should be sold or transferred and then sold. Which approach is best will depend on the tax situation of the beneficiaries as well as the estate.

Lastly, there is a similar relief which is available for lifetime gifts. Where an asset which has been gifted prior to death has fallen in value and is subject to IHT, a claim can be made for the reduced value to be substituted in the valuation of the estate at the date of death. This relief is only available if the transferred asset is still owned by the person to whom it was gifted or their spouse or civil partner.

Donating Your Body To Medical Science

Possessions and money are not the only issues which can be considered when making a will.

Some people choose to donate their body to medical science after death in the hope that it will be of some practical use. Donated remains are used by medical students for anatomical examination, for research to improve understanding of the human body and also for education and training, usually by those learning surgical techniques.

Under the Human Tissue Act 2004, which came into force in 2006, an individual wishing to donate their body to medical science must give his or her written consent. Consent cannot be given by anyone else after death. A consent form can be obtained from your local medical school and a copy should be kept with your will. You should also tell family, close friends and your GP that you wish to donate your body.

The Human Tissue Authority (HTA) licenses and inspects establishments such as medical schools which teach anatomy using donated bodies. The authority holds details of the schools and can put prospective donors in touch with them. See its website at http://www.hta.gov.uk/ or telephone 020 7211 3437.

You will not receive any payment for donating your body and some medical schools may request that the donor's estate contribute to the cost of transporting the body, particularly if the donation falls outside the school's local area.

For those people who might have signed a consent form before the 2006 legislation, the HTA says that the new regulations allow an earlier documented and valid consent for body donation to be honoured.

However, it points out that 'the ease with which your body donation offer is accepted might be improved if you include an updated intention to donate your body in your will. More details can be obtained directly from the anatomy establishment to which you wish to donate your body'.

People who choose to donate their body or organs do so in the hope that this will benefit others. Despite the donation procedures being different, it is possible for a person to be registered as an organ donor and to have registered their wish to donate their body to a medical school.

Medical schools will usually decline a body donation if the person has undergone surgery to remove organs for transplant. If someone wishes to register for both organ donation and body donation, the HTA suggests that they include this in their will and ensure that those closest to them are aware of their wishes.

All medical schools welcome the offer of a donation. However, certain medical conditions may lead to an offer being declined. More information can be obtained from individual schools.

If a medical school is unable to accept a donation, it may be able to help you find another school which can.

Medical schools will usually arrange for a donated body to be cremated, unless the family requests that it be returned for a private burial or cremation.

Alternatively, the following human tissue banks accept brain and spinal tissue for research into specific conditions. As well as needing particular types of tissue from people with the conditions named below, they also accept donations of brain and spinal tissue from people without these conditions as controls in their research.

London Neurodegenerative Diseases Brain Bank - Tel: 020 7848 0290

Multiple Sclerosis (MS) Tissue Bank - Tel: 020 7594 9734

Tel for outside office hours: 07659 132045

Parkinson's Disease Tissue Bank - Tel: 020 7594 9732

Tel for outside office hours: 07659 104537

Brain Bank for Autism and Related Developmental Research, Oxford University - Tel: 0800 089 0707

IHT Nil Rate Band Transfers: Making the Claim

Inheritance Tax (IHT) allowances and reliefs are available individually to each taxpayer. Because transfers of assets between spouses or civil partners normally have no tax consequences for IHT purposes, it is easy to fall into the trap of thinking that there is nothing which needs to be done when making such transfers or when passing over the unused proportion of the IHT 'tax free'

allowance in the event of one partner's death. In fact, specific documents are required when the estate of the surviving partner is administered.

HM Revenue and Customs' guidance on the procedure for claiming the balance of the IHT nil rate band on the death of the second spouse or civil partner shows that the retention of these documents is important.

The personal representatives of the deceased will be required to supply the claim accompanied by the following documents relating to his or her late spouse or civil partner:

- the death certificate;
- the marriage or civil partnership certificate;
- a copy of the grant of representation (confirmation, where the deceased died in Scotland);
- the will (if any); and
- any deed of variation.

It is widely thought that the 'excess' of unused transfers (i.e. the difference between the transfers made and the nil rate band at the date of death) simply passes across to a surviving spouse or civil partner, but this is not the case. The way the transfer works is more complex.

It is recommended that the required documents are assembled and stored in a safe place, together with your will.

Burial or Cremation – Who decides?

One of the most common statements of wish in a will is a statement outlining how one's remains should be dealt with. Many people think such a wish is part of the will per se and is binding on the executor, but this is not strictly the case. In law, your executor has the right to make such arrangements regarding your remains as they see fit. The rights of the executor in this area override those of family and friends.

Clearly, where your wishes are strong, it is important to ensure that your executor is appointed with care, understands your wishes and will comply with them. It is also important to avoid, if possible, any dispute over the validity of the appointment of your executor(s).

If your will is ruled invalid, or you do not have a will, the strict letter of the law makes the person or organisation on whose property you die responsible for the disposal of your remains. Where this is a hospital or care home, the relevant authority will normally allow your family to make the necessary arrangements.

If, however, a dispute over the validity of the will or the appointment of the executor(s) arises, the court would probably allow the person in lawful possession of the body to make such arrangements as they see fit. This may or may not accord with your wishes.

In a recent case in which the validity of a will (and therefore the appointment of an executor) was in doubt, the court ruled that the local health authority had the right to decide how to deal with the body of the deceased: fortunately, in this case it was released to the family.

Statutory Wills – Having a Will Written for Someone Else

It is a source of concern to lawyers and families alike that the majority of people never make a will. Often, the intention to make a will is there, but somehow the person never seems to 'get around to it' and dies or becomes incapable before a will can be made.

It is possible, however, for a will to be written for someone who lacks the mental capacity to make one. The Court of Protection can, when there are objectively reasonable grounds for doing so, order that a statutory will is created. Such a will can be a variation on an earlier will or, where there is no earlier will, a will can be written from scratch to prevent the estate being distributed according to the laws of intestacy. Sometimes, a statutory will is desired when there has been a change in the circumstances of someone who has an existing will which is no longer appropriate.

For a statutory will to be created for someone, that person must lack the mental capacity to do this for him or herself. The task which faces the Court of Protection is to create the will which would have been written by the person at that time were he or she mentally competent to do so. In doing this the Court will consider the known views and attitudes of that person with regard to relevant matters and people. The Court will not try to steer the middle path in order to 'keep the peace' within a family if it is the Court's view that that is not what the person would have done.

To have a statutory will prepared, sufficient evidence must be gathered regarding the person's lack of mental capability. Only if the Court is convinced that the evidence is there will it permit a statutory will to be drawn up. The Court will then take account of the person's circumstances and known views in order to take a reasoned view of the content of the will.

If a statutory will is being considered, it is important to take legal advice early in the process, especially where the statutory will is intended to vary an earlier will, as there may well be technical legal issues to address. Consideration will also need to be given at an early stage to possible claims on the estate by dependants.

Once all the necessary information has been gathered, it is presented to the Court, which will consider the evidence before it: the Court will seek to take a 'broad brush' approach and will not seek to create a will filled with detailed provisions.

An application for a statutory will can be made by:

- the receiver for a patient under the Mental Health Act or the person who has applied for the appointment of a receiver if none has yet been appointed;
- anyone who would benefit from the person's known will or under the application of the intestacy rules;
- any person for whom it might be reasonably expected that provision would be made under the will;
- the person's attorney; or
- any other person authorised by the Court.

Care Home Fees And Your Home

Normally, an elderly person who lives in a care home is required to pay all or part of the cost of their care based on criteria laid down in the Charging for Residential Accommodation Guide (CRAG).

A local authority is not required to charge for care where the period of accommodation lasts for fewer than eight weeks. After eight weeks, the local authority must charge at the standard rate and carry out an assessment of means to ascertain the appropriate level of charge to be made to the resident. A resident who refuses to be assessed will pay the full standard rate without contribution from the local authority.

The means assessment is based on the capital and income of the resident. The home of a resident is disregarded when they intend to return to it and it is still available for them to occupy, or they are taking reasonable steps to dispose of it in order to acquire another home to which they intend to return after temporary residence in the care home. A property owned jointly with others will be considered to be an asset proportionate to the number of joint owners, so where there are three owners, a one third share of the total value would apply. There are special rules governing the valuation for assessment purposes of properties held in different legal forms or where the property is difficult to realise.

In general terms, financial assets are regarded as part of the resident's capital but personal property is not, provided the purpose of the acquisition of the personal property was not to avoid the amount of assessable capital. There are special rules for some types of investment, such as insurance bonds.

Generally, the income assessment includes all income, although there can be exceptions where appropriate, such as, for example, for business income where the business is being sold.

At present, a resident in a council care home must use their own capital to pay for their care until the capital is reduced to £23,000. After that, a contribution is made on a reducing scale until the resident's capital is reduced to £14,000. This is done by the local council assessing each additional £250 of capital as producing an income of £1 per week. When the capital is reduced to £14,000, no further contribution is necessary.

The value of a house is not taken into account as capital for the first 12 weeks of residential care and is not taken into account at all if your spouse or civil partner continues to live there. However, if a permanent transfer to a care home is likely, as is often the case, then the home becomes an assessable asset. It may be thought, therefore, that it is a good idea to transfer the home to (say) a family member so it falls out of assessment.

However, when an attempt has been made to manipulate the income or capital of the resident to prevent it falling into assessment, for example by transferring an assessable asset, CRAG allows the local authority to make an assessment to recover the charge from the person to whom an asset has been transferred in the six months prior to admission to the care home.

In principle, if the purpose of the transfer is to avoid care home costs, the council can challenge a transfer made at any time, so even if if the transfer happened more than six months before you moved into care, it can assess you as if you still own the assets.

It is naïve to think that simply transferring assets shortly before going into a care home will be effective as a way of avoiding liability for the fees. Any arrangements to transfer assets should be part of a family wealth preservation plan based on advice from your solicitor.

Mental Capacity – What it is and what it means.

Mental capacity has always been something of a problematic area of the law.

The Mental Capacity Act 2005 was enacted to put mental capacity law on a firmer footing and is based on the concepts of 'best interests' and 'capacity'. Under the Act, capacity is stated to be absent when the person is unable 'at the material time…to make a decision for himself in relation to the matter because of an impairment of, or disturbance in the functioning of, the mind or brain'.

Interestingly, the lack of capacity need not be absolute or permanent – it can be limited in both time and to the matter which is under consideration. A person may lack capacity at one time and not another and may lack capacity with regard to some sorts of decisions and not others.

Capacity is considered to be lacking in a person if he or she:

- cannot understand the information relevant to the decision, including the consequences which flow from making or failing to make it;
- cannot retain the information long enough to make the decision;
- cannot use the information as part of their decision-making process; or
- cannot communicate their decision by any means.

Once it is decided that a person lacks the mental capacity to make a decision, those responsible for making decisions on their behalf are required to do so in whatever way is in that person's best interests.

A person is assumed to have capacity unless it can be established that he or she does not. Before that is decided to be the case, all practical steps must have been attempted, without success, to facilitate their making a decision.

The fact that a person lacks capacity does not mean that their wishes should be ignored. An attorney appointed to make decisions on their behalf should consider their current and past wishes, the views of relevant others (such as family members) and any beliefs or values that the person who lacks capacity might hold which would affect a decision.

The Act provides for the creation of Lasting Powers of Attorney (LPAs), which may allow the appointed attorney to make decisions relating to the person's property and financial affairs, personal welfare, healthcare and medical treatment. LPAs cannot be used, however, unless they are registered with the Office of the Public Guardian.

It is normally straightforward to make arrangements for your affairs to be managed by a trusted person in the event that you can no longer do so yourself. The execution of a power of attorney 'just in case' can give you and your family the assurance that your affairs will be managed smoothly in the event of a loss of mental capacity. Contact us for further information.

Variations of Wills After Death

A will is made to give effect to a person's wishes as to how their property should be distributed after death. Sometimes, however, this does not produce the desired effect, for example where the family circumstances have changed since the will was made. There are a number of remedies which can be used in such cases.

To rectify a will, a court can declare it invalid, or it can add or omit words to give effect to the testator's true intentions. A will can be declared invalid if the testator was not mentally capable or created it under undue influence from another person.

Under the Inheritance (Provision for Family and Dependants) Act 1975, it is possible for anyone who can prove they were dependent on the testator to a material extent during their lifetime to claim a share of the estate if they have been excluded from the will. For example, a long-term cohabitee is normally entitled to claim a share. A claim under the Act must be made within six months of the testator's death. A valid claim can be resolved either by a settlement between the claimant and the beneficiaries or by an order of the court.

Where the will is not disputed, variation can occur if a beneficiary disclaims a gift or if all the beneficiaries agree to vary the clauses. The latter option is called a Deed of Variation and it will give the new clauses the same effect as if they had been in the original will.

A Deed of Variation must be a written instrument and must have the written agreement of all beneficiaries. It must be made within two years of the testator's death. Minors cannot give consent. If any of the beneficiaries are minors, an application must be made to the court to obtain consent on their behalf.

A variation is normally sought where the will does not provide the outcome desired by the testator's family. Examples of this are when a beneficiary does not want to inherit an asset, where a person was excluded from the will when they were led to believe otherwise or where no provision was made for some of the testator's dependants. A variation may also be made to clarify or improve ambiguous drafting.

A particularly common reason for a beneficiary to refuse property is in order to reduce the Inheritance Tax (IHT) burden on the estate. For example, a Deed of Variation can be used to pass property to the testator's children, rather than to his or her spouse, in order to avoid IHT payable on the spouse's estate when he or she dies. The spouse might therefore refuse the gift and request that it be passed directly to the children. If the IHT bill is affected, HM Revenue and Customs must be informed within six months.

Deeds of Variation are best suited to families who can agree on a desirable outcome – indeed, they are sometimes referred to as Deeds of Family Arrangement. They are not normally suitable where the will is disputed. Their most useful function is probably as an IHT planning device where the testator has not considered this.

Who Chooses Your Executor?

The person who makes a will is free (within limits) to appoint any executor they choose and the appointment of executor is contained within the will itself.

However, it is not uncommon for the beneficiaries under the will to want to have a different executor from the one appointed. A case currently before the courts will determine whether or not they have the right to do so.

The case concerns a man from South London, who decided to take legal action to have the executor appointed under his late stepfather's will removed, after he received a quote for doing the work which was half the amount that the executor will levy.

The executor, a firm of will-writers, has refused to step down and the court will be asked to rule on whether the beneficiaries of an estate can act to remove an unpopular executor.

An executor can decline to act, but cannot normally be removed. If you are concerned about how to choose your executor, contact us for advice.

Drawdown Lifetime Mortgages

For people who have money tied up in their homes who wish to release capital for expenditure, or possibly to give to family members, the drawdown lifetime mortgage (DLM) is a possible vehicle.

A DLM is simply a mortgage, but one which is drawn down over time. For example, a person whose home is valued at £500,000 may get agreement that a drawdown of £125,000 will be supplied.

There is no need to take the sum at once and interest is only payable on the amount actually drawn down. In practice, sums are taken piecemeal.

The advantage of such a scheme is that the savings in interest payable can be considerable compared with taking the whole sum 'up front'. Also, it is not uncommon for people who release a large sum all at once to spend it more quickly than they had anticipated.

One other advantage of DLMs is that the property remains yours so any future growth in value belongs entirely to you. This can be very useful, particularly if you intend to 'downsize' at a later date. In such circumstances the loan can usually be readily transferred to the new property.

Also, most drawdown plans carry a guarantee that should the value of your property fall to the extent that the loan plus interest and charges exceeds the value of your house, your right to remain in your home is preserved.

If you wish to take out a DLM and someone else lives with you in your property, it will be necessary to get them to sign a waiver confirming that they have no right to remain in the property if you die or move into a long-term care home.

Should it become necessary for you to have care provided in your own home, the way contributions to the cost of the care are calculated means that the value of your home and mortgage are ignored.

Where care at home is necessary, if you have a large lump sum, then that money will be taken into account when assessing your contribution to the care costs. This may in effect mean that the capital is lost over time. However, with a DLM the authorities cannot require you to draw down the rest of the available drawdown facility, which can assist in the preservation of family capital.

Giving to Charity – Tax Efficiently

There are a variety of ways of giving to charity, some of which are more tax-efficient than others. Here is a short round-up of some of the possibilities.

For company directors, consider making the charitable gift out of the company if the alternative is to make the payment out of your after-tax income. This will allow the company to claim Corporation Tax (CT) relief as a deduction against profits and will, in effect, save the employer's and employee's National Insurance Contributions on the payment. Note, however, that there will be no additional recovery of tax by the charity (by the grossing-up of the gift) as there can be in the case of payments made by individual taxpayers.

Remember that to qualify as a charitable donation a gift by a business must be a gift of cash. Gifting non-cash assets or the value of services will not qualify for relief against CT and might in some circumstances have VAT implications. There are a number of more technical exclusions also, so if a proposed gift is part of a larger arrangement of any sort, take advice.

For individuals, gifts of money to charity qualify for income tax relief. Normally, the gift is deemed to have had basic rate tax deducted and additional relief is available for higher rate taxpayers by way of a claim on the giver's tax return. The charity will reclaim the basic rate tax directly if the appropriate documentation is filled out, confirming that the donor is a UK taxpayer.

Gifts to charity in a will attract full Inheritance Tax relief at (currently) 40 per cent. There are pros and cons of either making gifts as a bequest of a specific sum or as a percentage of the residual estate, so if you are considering putting a substantial charitable bequest in your will, it is worth taking professional advice.

What is a Trust Fund?

A trust comes into effect when a 'settlor' places money, land or other assets in the hands of trustees. The trustees are the legal owners of the property but are obliged to hold and manage the property for the benefit of a person or a group of people, who are called beneficiaries.

Types of Trust

Bare Trust

In this type of trust, sometimes called a 'Simple Trust', the beneficiary has an immediate and absolute right to the property in the trust. The trustees have no discretion as to how the fund is managed. They must manage the trust assets for the maximum benefit of the beneficiary. The income of these funds is taxed as if it is the income of the beneficiary. Parents or grandparents can be trustees of a Bare Trust for their children or grandchildren.

Discretionary Trust

Here the trustees have discretion over to whom and when payments should be made and also whether conditions should be attached. They are usually given discretion as to the investment of the fund. This type of fund may or may not be allowed to accumulate income. Discretionary Trusts are often used when there are worries that a beneficiary may act irresponsibly if given assets outright.

Accumulation and Maintenance Trust (A&M)

In an A&M Trust, the settlor places money in trust for children/grandchildren until they reach a specified age (maximum age 25), when they become entitled to the trust fund. A&M Trusts are used to provide financial support for younger family members. Until 2006, they had favourable tax treatment, but they are now less 'tax friendly'.

Interest in Possession Trust (IIP)

Here, the beneficiary has a right to the income but not the capital of the trust fund. For example, a beneficiary may be allowed to receive the income arising from shares during their lifetime, with the shares going to their children on their death.

Trusts can be used for many purposes and different types vary in their governance and tax treatment. Trusts can be a very effective way of protecting family wealth. Contact us for assistance in forming your wealth protection plans.

Lasting Power of Attorney

A Lasting Power of Attorney (LPA) is the legal document gives you the right to choose someone (the Attorney) to make decisions on your behalf.

This could be for things like property, finances or health care. It may be that you lack the mental capacity to make such decisions in the future or you simply wish someone else to make those decisions for you.

There are two types of LPA:

- The property and financial affairs LPA
- The health and welfare LPA

Property and Financial Affairs LPA

A Property and Affairs LPA lets you appoint someone to make decisions on the way your property affairs are managed and how your money should be spent.

Personal Health and Welfare LPA

A Personal Welfare LPA allows you to choose someone to make decisions about your healthcare and welfare. This may be decisions to refuse or consent to treatment on your behalf and deciding where you live e.g. nursing home.

These decisions can only be taken on your behalf when the LPA is registered and you lack the capacity to make the decisions yourself.

Who is eligible to make an LPA?

If you are over 18 and have the capacity you can make an LPA that appoints one or more Attorneys to make decisions for you. You can't make a joint LPA. It is for individuals only.

Lasting Power of Attorney replaced the Enduring Power of Attorney (EPA) on 1 October 2007.

If someone was given power through an EPA before 1 October 2007 they can still use it and apply to have it registered. This person has a duty to apply to register the EPA as soon as they believe that you are becoming or have become mentally incapable of making financial decisions for yourself.

Can You Cancel an LPA or EPA?

You can cancel your LPA only if you have the mental capacity to do so. Any dispute about a cancellation of an LPA will normally be decided by the Court of Protection.

Enduring power of attorney (EPA) cancellation...

It's possible to cancel an unregistered EPA if you have the mental capacity and you don't have to apply to the Court of Protection.

If the EPA is registered then you have to demonstrate to the Court of Protection you understand who the attorney is and what powers they have, you know the effect of the cancellation and why the EPA has to be cancelled.

LPA & EPAs can both be revoked if you or your attorney becomes bankrupt. This excludes Personal Welfare LPAs.

How Many LPA's To Appoint?

If you become mentally incapacitated later in life you might not be able to check up on your attorney. Because of this it's extremely important to choose someone you trust.

Sometimes it makes sense to have more than one attorney because this can prevent any abuse of responsibility. It also makes sense to choose someone that is good at managing finances and has your best interests at heart.

Your situation may be complex or simple but you should always get advice from a solicitor experienced in this area of law.

Digital Inheritance and Wills

Have you included your Internet passwords in your Will because as a nation Britons already have a £2.3bn 'digital inheritance' lined up.

1 in 4 people already have more than £200 of digital assets protected by passwords.

In a survey by Rackspace of 2,000 adults almost a third of people have assets online they will include in their will and 11% have already done so.

If you have digital assets, which could include bank accounts, music services, videos, electronic subscriptions, paypal accounts and photos it makes sense to let your loved ones know where they can get your passwords.

Valuables are often digital nowadays. It makes sense to include them in a will.

What happens to these valuables when someone passes away is very important. Solicitors in Bournemouth has now started to advise people to include their digital inheritance in their will. It is relatively straightforward to update a will or add a codicil detailing this.

Fabio Torlini, of Rackspace, who commissioned the survey said:

'The cloud is increasingly becoming part of our everyday work and personal lives. 'With an estimated £2.3billion invested in digital treasures, it's imperative that people consider the associated security and legacy implications.'

People hoard things and fear throwing things away for a number of reasons;

Some people do it because they are loathe to throw anything away...whilst others are just disorganised and so they save everything in the cloud (digitally) in case they need it one day.

But ultimately as society moves more to a digital society then there's even more value locked up in digital assets.

If you would like to amend your will or talk about this issue please feel free to contact us about digital inheritance.

Final Wishes Repair Kit...

Your Free Copy of "These Are The Final Wishes Of"....by John Stone.

At some point we all think about our own passing and how we would like to be remembered. Inventing Your Own Goodbye is an expression I came up with to summarise my guide on how to organise your own passing.

It's a guide to help you achieve peace of mind as well as helping others when they are in mourning and having to cope with your death. Basically, my guide makes things easier for them to cope.

At a time of high emotional distress the last thing that you would want to do is cause heartbreak, anguish and tears.

You can get your free guide from this website www.TheseAreTheFinalWishesOf.com

By printing it out and completing it you will demonstrate your care and concern for your loved ones.

It's not a substitute for a Will. But it's something that I know complements a well-drafted Will and will make life easier for your loved ones to cope.

As well as celebrating your life how you would wish it to be remembered.

Have You Got Questions That You Would Like Answered By Paul Solomons?

This is your free consultation certificate page.

Scan and send this page by email to office@solomonslaw.co.uk or fax to 44 (0)1202 798 655 along with your name, address and phone number and email for a free consultation by phone.

If you wish, you may call the office on +44 (0)1202 802 807.

You must quote “Book Certificate” if you call by telephone so we know you have this book.

Paul Solomons has been qualified Solicitor since 1989. He is the founder and owner of Solomons Law and has been a legal partner since 1995.

He's a highly-qualified and sought-after legal specialist dealing with Wills, Trust, Probate and Inheritance Tax matters.

The founder of the website www.iht-solutions.net and a writer on Wills & IHT matter for the well-regarded Yell.com solicitors pages, he's always been determined that clients should understand what and why he does what he does for them.

He is also a member of the specialist organizations, the Society of Trust and Estate Practitioners (STEP) and the Probate Section of the Law Society.

Active in the Bournemouth and Christchurch Community, he devotes a good deal of his spare time (between running a busy law firm and his family) to various local Charitable organizations.

In particular, Paul, has been the chair of the Board of Trustees of Christchurch Citizens Advice Bureau for a number of years.

With this book he describes the basics of Wills, Probate and Inheritance Tax and highlights some technical and not-so-technical arrangements for readers that they can ask their present or future law firm about.

Subjects covered include;

Wills And Probate - Background Information.

Mental Capacity – What it is and what it means.

Lasting Power of Attorney - When you need one.

Statutory Wills – Having a Will Written for Someone Else

Inheritance Tax - How it is paid and who pays it

Potentially Exempt Transfers, Equity Release, Care Home Fees, Choosing Executors,and much more...