



A I · L A W

# Estate Planning

- Private Client

The brochure provides a guide for the firm's Estate Planning and Asset Protection services.

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# Wills:

A Will is a declaration made, in accordance with statutory requirements, of a testator's intention regarding matters they wish to take effect on death.

**All clients should be advised to make a Will** for any number of reasons, including: to alter the strict devolution under the intestacy rules, to appoint executors and guardians of their choice, to add or alter the statutory administration provisions, to make directions as to the disposal of their body, or to recognise individuals by legacies of money or items. A person is said to die intestate when they do not leave a Will. Without a Will, the statutory rules of intestate succession will apply to their estate and provide directions as to how it should be distributed. A Will is also a key element of any individual's tax planning. Without a Will, the scope for mitigating inheritance tax (IHT) that would otherwise arise on death, is reduced.

## Essential Reasons for making a will

- to avoid your assets being distributed in accordance with the intestacy rules which could mean, for instance, your spouse not inheriting all of your estate
- to ensure that those you wish to inherit your assets on your death actually get them
- to nominate executors of your choice to deal with the distribution of your estate in the certain knowledge that they will comply with your wishes
- to nominate your preferred guardians of your children to avoid disagreements or family upsets
- make small personal gifts
- to take advantage of tax saving strategies

## Other Example Possible Reasons

- to explain why a possible beneficiary is being excluded (to prevent a deceased's wishes from challenge)
- to ensure the continuation of a family business
- to ensure that 'first' and 'second' families are treated fairly
- to reflect lifetime rearrangement of assets
- to give specific guidance to executors

## Considerations of a Will

Some thought needs to be given a number of issues that will come up during discussions about why you should make your will and why you should put particular provisions in it.

### Funeral Arrangements

You can specify whether you want your body buried or cremated. You can also state whether you are willing for your body to be used for medical research.

### Executors

This is the person you appoint to safeguard your possessions, pay debts and ensure your instructions in the Will are carried out. An Executor can be anyone, even a beneficiary, over 18 years of age. If you are leaving everything to one person, you may make them the only Executor, it is advisable to have at least two Executors although, more can be unwieldy when decisions have to be made. It is also advisable to appoint professional executors to take care of everything such as the partners of Ai Law firm.

### Guardian

It will be necessary to appoint someone for the day-to-day care of your children under 18 years of age. It is possible to appoint more than one person eg a sibling and their spouse but this could be difficult if, say, they were to divorce. It would also be prudent to consider some form of living income fund being made available to the guardian(s) to defray increased expenditure.

## Legacies

You have the ability to leave sums of money or specific gifts. You can leave them, if they belong solely to you, without difficulty. However, you may need to consider if they will be needed by a surviving spouse/civil partner. In such a situation you will need to make some provision, such as a life interest to the survivor, to cover this situation. This is complex and will require input from your solicitor so that the best method can be adopted. Remember that if you leave something to your surviving spouse in the belief that they will honour your wishes in respect of it they are not obliged to do so.

If the gift (particularly of money) is to children you will have to decide at which age they will be able to fully enjoy it. They may be able to legally force the use of it at 18 but that is no reason to stipulate a later age.

If you are making gifts of specific items such as furniture, jewellery etc, it may be worth considering a 'letter of wishes' to express the hope that a designated person will distribute them as you wish. This is a very flexible arrangement and you can change the list at any time without the legal formalities and expense of a Will, although hard to enforce.

## Residue

This is what is left of your estate (except any jointly owned assets), after payment of debts, legacies, any Inheritance Tax, and legal fees. Jointly owned assets usually pass automatically to the other joint owner(s). You must, however, specify who is to inherit the residue, and in what proportions. You should also cover what should happen to the residue if any of these people die before you.

## Things to Remember

On marriage (or remarriage), your old Will is automatically revoked and has no effect. If you die without making a new Will your estate will pass to a list of your relatives specified by law (under the intestacy rules).

On divorce, any gift in your old Will to your ex-spouse is cancelled as is his/her appointment as Executor but the rest of the Will stands. This can create problems and it is better to make a new Will.

If you are not making any provision for a spouse or partner, or a former spouse, or a child, it is possible that he/she could claim against your estate. If this applies to you, you should ask for extra advice about this.

# POWERS OF ATTORNEY

Power of Attorney is a legal document that enables an individual to appoint one or more people (known as 'attorneys') to make decisions on their behalf.

In order to create a valid ordinary power of attorney, the donor must be capable of understanding the nature and effect of the power. The power of attorney must be executed as a deed by the donor and the donor's signature must be witnessed.

## Lasting Powers of Attorney

A Lasting Powers of Attorney (LPA) is a legal document that enables an individual (or 'donor') to appoint one or more people (known as 'attorneys' or 'donees') to make decisions on their behalf. Unlike a general power of attorney an LPA continues to take effect after the incapacity of the donor.

LPAs were introduced by the Mental Capacity Act 2005 (MCA 2005) and replaced the old Enduring Powers of Attorney (EPAs) from 1 October 2007.

There are two forms of LPA:

- Property and Finance: to deal with property and financial affairs
- Health and Welfare: to deal with health and welfare issues

The two types of LPA are independent and the donor may appoint different persons to act as attorneys under each type of LPA.

## Ordinary Powers of Attorney

An ordinary power of attorney or general power of attorney is a basic document that gives the attorney the power to deal with the donor's financial affairs, whilst the donor retains capacity. It can be as wide reaching or as limited as the donor wishes. An attorney cannot generally exercise any of the functions he has as a trustee or PR but such authority can be specifically delegated by way of a trustee power of attorney under section 25 of the Trustee Act 1925. An ordinary power of attorney will be automatically revoked by the mental incapacity of the donor.

Ordinary powers of attorney are governed by common law and the Powers of Attorney Act 1971 as to, for instance, their execution and revocability.

# FAMILY BUSINESS AND COMPANY PLANNING:

Generally, a ‘family business’ is a business which is owned and/or run by more than one member of a family. It may evolve from a business created by an entrepreneur to become a family business when the founder’s spouse or children obtain a shareholding and/or are employed in the business.

Thoughtful planning and organisation are key to successful family businesses. This might involve creating a ‘family constitution’, containing provisions about ownership and other matters that the family wishes to be legally binding. These might be covered in the articles of association and perhaps a shareholders’ agreement (for a company) or partnership agreement (for a partnership). Many family businesses are run informally with little in the way of governance structure or recognised process. While there is always a ‘natural’ or ‘organic’ governance system based on understandings, formalising structures is advised and

## Forms of business vehicle

It is important that the most appropriate business vehicle is chosen. There is not one vehicle that will suit the needs and demands of every business. Each structure has its advantages and disadvantages. The decision as to which vehicle to use to carry on a particular business will be complex and dependent on various legal, tax and commercial considerations—there may not be a perfect fit. In addition, the vehicle originally chosen to carry on a particular business may not continue to be the right choice for that business as it develops and matures. In addition to the commercial and legal reasons for the choice of business vehicle, the tax treatment of each different form of business structure will often be a decisive factor in whether it is appropriate for carrying on a particular business.

## Companies

A company is a separate legal entity, distinct from its members. It is owned by its members (also known as shareholders) and it is managed by its directors. It is regulated by the Companies Act 2006 (CA 2006). The types of company that can be incorporated under CA 2006 are a public company limited by shares, a private company limited by shares or limited by guarantee, and an unlimited company.

Understanding corporate entities is relevant for Private Client practitioners in terms of advising family business owners, but also in relation to advising wealthy individuals on trust and tax planning structures, which may include a company at some level. Separately, some charities may be structured as a company.

UK companies are commonly used for trading in UK property.

## Tax treatment of a UK company

A UK company is subject to UK corporation tax on its worldwide income and gains (section 5, *Corporation Tax Act 2009* (CTA 2009)), including any UK rental income it receives (section 209, *CTA 2009*) (less any allowable deductions such as interest on loans and expenses) and any gains realised on the disposal of properties.

## Tax treatment of UK company shareholders

Profits are generally extracted from UK companies in the form of dividends paid by the company.

Individual shareholders who are resident in the UK for tax purposes are subject to **income tax** on dividends received

An investor may exit their investment by either selling their shares in the company or the company may sell the properties it owns and be wound up. Individual shareholders who are resident in the UK for tax purposes are liable to **capital gains tax** on any gain realised on a disposal of shares (section 2, *Taxation of Chargeable Gains Act 1992* (TCGA 1992)).

If the company sells the properties it owns it will be liable to corporation tax on any gains realised on a disposal of the properties. If the company is then wound up, and pays out the amounts realised, the shareholders will be treated as having disposed of their shares and will accordingly be subject to capital gains tax or corporation tax on any gain realised.

## Non-UK company

Non-UK companies are commonly used to investing UK commercial property. Generally, such companies are incorporated in countries that do not impose tax on income and gains and that do not levy withholding tax on dividend or interest payments. The most common choices of jurisdiction are Jersey and Guernsey because both countries have a 0% tax rate on profits and there is no withholding

tax on dividends or interest. Another advantage is their proximity to the UK, making it easier for directors to travel to the relevant country for board meetings.

Non-UK companies are generally suitable for investment in one property or multiple properties. If multiple properties are to be acquired, it is common for the company to incorporate a number of non-UK subsidiaries (spv). Each SPV will hold a single property. This has a dual purpose:

- It ensures that if any of the properties are considered to be held for trading purposes, rather than investment, it does not taint the investment status of the other properties.
- If a property is to be sold, the SPV can instead be sold. No SDLT or LTT is payable on the transfer of shares in a property holding company.

As a buyer is not liable to pay SDLT or LTT on the purchase of an SPV (as opposed to the purchase of a property) it is common for a higher purchase price to be negotiated with the effect that the SDLT or LTT saving is essentially shared between the buyer and seller.

## **Tax treatment of a non-UK company**

In relation to income arising from UK property With effect from 6 April 2020, non-UK companies are chargeable to UK corporation tax on UK property income. The non-resident landlords scheme (NRLS) applies to rental income paid to the non-UK company with the effect that tenants (or where there is a UK agent who collects rent, that agent) must withhold tax at the basic rate of income tax from payments of the rent.

## **Partnerships**

The Partnership Act 1890 (PA 1980) sets the legal framework that applies to general partnerships. A partnership under PA 1890 is described as the relationship that subsists between persons (which includes individuals and corporate entities) carrying on a business (which includes every trade, occupation and profession) in common with a view of profit. A general partnership is not taxable in its own right. Instead, the partners are taxable on their share of the partnership's profits and gains (or can claim relief for their share of its losses), whether or not the profits and gains are distributed to the partners. For this reason, a partnership is sometimes

referred to as being transparent for tax purposes—the legislation ‘looks through’ the partnership to tax the underlying partners.

## **Limited partnership and limited liability partnership**

LPs have traditionally been used as property holding vehicles. Recently, LLPs have become a popular choice as they have a separate legal personality, unlike an LP. Both LPs and LLPs offer the advantage of flexibility in the drafting of the partnership deed so that profits can be shared in variable ways. As LPs and LLPs are tax transparent, there is no tax leakage. They are, therefore, often the choice of vehicle for pension fund investors. As pension funds are generally tax exempt, they prefer to invest in transparent entities so that no tax is payable on their share of any income or gains. However, income and gains derived by a pension fund from investment in property investment LLPs are not tax. As a result, where the property holding vehicle is an LLP, it is common for a feeder fund to be incorporated through which any pension funds can invest.

## UK ASSET PROTECTION

UK based property is subject to UK laws. It is important for overseas investors who are not able to inspect or oversee their investment on a day-to-day basis to have safeguards in place to ensure it is protected from the risks of ownership.

### Declarations of Trust and Ownership Structures:

Where two or more people invest in property in England and Wales it will be held in one of two ways, either Joint Tenants or Tenants in Common.

#### 1. JOINT TENANTS

If a property is purchased as joint tenants buyers each have an equal share. Upon the death of either party the property will automatically pass to the surviving owner. This happens whether a Will is made or not and there is no need for any further formality. Neither co-owner can leave his or her share in the property by Will to somebody else. The survivor can deal with the property in whatever way he or she chooses. People buying a property by this method should make Wills in order to determine what would happen to the property in the event of the death of both of them. If you separate at a later date, the joint tenancy can be severed and you will each hold as tenants in commons in equal shares in the property. In such a circumstance you should consider remaking your will.

#### 2. TENANTS IN COMMON

If a property is purchased as tenants in common the buyers stipulate their shares in the property; that could be in equal or in unequal proportions and this can be set out in a document called a Declaration of Trust if the shares are unequal. This can be because one has contributed more to the purchase price than the other. Upon the death of either party the survivor would retain his or her own share in the property whilst the deceased owner's share would pass under their Will, or if there is no Will, the Intestacy Rules would apply. Unless the survivor is left the share of the one who died by Will he or she is not the owner of the whole property.

In either case, any subsequent contribution to the property, say by paying off part of the mortgage or paying for an extension to the property, does **NOT** change the shares each party holds in the property unless there is a Declaration of Trust specifying. It is essential in order to protect your respective interests in the property, that owners should attempt to agree such a Declaration of Trust. Please also note that in cases where owners are either legally married or enter into a civil partnership under the Civil Partnership Act 2004, your respective interests in the property may, upon divorce or dissolution, be subject to property adjustment orders by the Courts different from what you have decided in your Declaration of Trust.

## Freehold and Leasehold Property

A leasehold property is an estate in land which provides the holder of the estate with rights of possession and use of the land but not ownership. The most common types of estate ownership in UK is either freehold or leasehold. Freehold means absolute ownership in fee simple. Leasehold means a right to ownership granted by lease out of the freehold title. It is very common to own a property as a leasehold and it has advantages. For example in an apartment block, an owner will typically own an apartment. However in order to enjoy the use of that apartment the building itself and common areas will need to be maintained and functioning. Further there are other owners of apartments within the building. Granting a leasehold right allows an owner to own an apartment together with other apartment owners in the same building, and also allows a way for each apartment owner to contribute to the costs of the upkeep of the building. A tenant's obligations under its lease are known as covenants. Where a lease is beyond 21 years it is said to be a 'long lease'. Common lease times in UK are 999 years, for older leases that are already running; 250 years; and more commonly in London 125 years.

## The advantages of land registration

It is compulsory for all property in England and Wales to be registered at HM Land Registry. Land that is unregistered if it has not been dealt with since before compulsory registration was introduced.

Registration under the Land Registration Act 2002 supports home and property ownership and the secured credit market by:

- giving greater security of title
- providing greater protection against the possibility of losing title by adverse possession
- indemnifying proprietors under section 103 and Schedule 8 of the Land Registration Act 2002 against any loss if they are deprived of their state-backed title (see sections 11 and 12 of the Land Registration Act 2002) on a rectification of the register under section 65 and Schedule 4 of the Land Registration Act 2002
- certainty and simplicity into conveyancing
- snapshotting the title other than certain overriding interests
- showing the general extent of a title by means of a title plan
- ensuring that capital can circulate freely in the economy by making land readily available as security

## **PROTECTING AGAINST FRAUD**

Whilst registration has streamlined the UK property market and the conveyancing process, it also poses a risk of fraud through identity theft of readily available information on title. Overseas investors are particularly at risk to this as they may never actually view their property, or may not receive letters or communication about changes, making it easier for fraudsters to deal in the property.

HM Land Registry offers an anti-fraud property alert service which notifies a registered proprietor or person they may nominate if there are any applications made against the title to the Property.

It is also possible to protect against fraudulent transactions by opting to register a restriction on the title, which states that any disposition of title must only be made with written consent from the registered proprietor or their conveyancer.

We can offer this service, both the entry of the property fraud alert and / or restriction, and as the person nominated to receive such alerts in the event of any movement on the title.

### **Protection against forfeiture proceedings:**

If the Rent or Service Charge is unpaid under a lease, or there is a breach of tenant covenants, the Tenant is in breach and may be subject to the Landlord re-entering the Property to take back possession. The Tenant would be entitled to ask the court for relief from forfeiture which would usually be on terms of paying the arrears and costs, however this can result in significant and unwanted fees and stress.

We have experienced many situations where overseas investors have become subject to forfeiture proceedings and/or tax demands simply because they have not received service charge and ground rent demands, due to them being based overseas, or they have not actively monitored post.

We offer a service of providing a SAIL service address for the purpose of receiving notices under leases.

# INTERNATIONAL PRIVATE CLIENT:

## Foreign UK Wills

Due to laws on the disposal of assets upon death, we advise all of our foreign buyers to consider making a UK will to deal with any UK assets they may have to ensure that in the event of death there is a valid will in place and UK assets may be dealt with by your appointed executor in accordance with your wishes.

Under UK law, upon your death a grant of representation is required to allow your personal representative to deal with your UK assets in accordance with your wishes. You can make a will to decide what happens to your assets after you die. If your will is not valid, any UK assets will be distributed in accordance with UK intestacy rules.

A will shall not be valid in UK unless it complies with the Wills Act 1867 (*as amended*). If you have a foreign will that is valid in the country that it was made and a grant of probate has been issued in that country, it must be resealed by the Probate of England and Wales Registry in any event before it can take effect in UK. A foreign grant can only be resealed if it is granted in a country which falls within the Colonial Probate Acts 1892 or there are reciprocal agreements in place between the country the grant is given and the UK. If the country in which the grant is given does not fall into one of these categories a full grant application must be made to the England and Wales Probate Registry for the will to take effect. Whether a grant is given will depend upon whether the will is valid and affidavits have been provided from the country along with evidence of a foreign grant of probate.

## Appointed Representative and Nominees

Managing a portfolio is hard enough. Managing investment overseas where different laws apply is harder still. It is advisable to appoint a professional representative to act as your nominee. Through use of an Ordinary Power of Attorney this can be as wide reaching or narrow as you choose. Examples can include: giving your representative the authority to enter contracts or sign documents on your behalf; to act as a service address; to act as a digital mail forwarder to keep you informed; to deal with tenancy agreements; to act as bank mandates or trusted nominees; to act as corporate nominees as shareholders in your UK company.

## NON-RESIDENT LANDLORDS SCHEME

Payments of rental income to non-UK resident landlords are subject to withholding tax at the basic rate of income tax (currently 20%). The tenant making that rental payment (or, if an agent whose usual place of abode is in the UK has been appointed to collect the rent and pay it to the landlord, that agent) is required to withhold the tax and account for the same on a quarterly basis to HMRC (*section 971, ITA 2007* and *Taxation of Income from Land (Non-residents) Regulations 1995 (SI 1995/2902)* (NRL Regulations)).

A non-resident landlord for the purposes of the NRLS is a person whose usual place of abode is outside the UK (rather than a person who is not tax resident in the UK) (*section 971(2), ITA 2007*). HMRC consider that:

- Individuals have a usual place of abode outside the UK if they usually live outside the UK (but not if they live outside the UK for a temporary period of six months or less).
- Companies have a usual place of abode outside the UK if the main office or other place of business is located outside the UK. Companies that are not incorporated in the UK are generally considered to have a usual place of abode outside the UK unless they are tax resident in the UK.

When calculating the tax to be withheld from the rental payment made to the landlord, the tenant (or agent) may deduct any expenses that he is reasonably satisfied are deductible when calculating the profits of a property rental business, provided that the tenant (or agent) (or a person acting on the direction of the tenant or agent) has paid those expenses (*regulation 9, NRL Regulations*). As a result, any expenses incurred by the landlord and any capital allowances will not be deductible in determining the amount of tax to be withheld. As the landlord may be entitled to greater deductions when calculating the profits of its property rental business, this can often result in the landlord being entitled to a refund when it submits its tax return.

UK corporation tax is extended to the UK property income of non-resident companies without a UK permanent establishment with effect from 6 April 2020.

Landlords can apply to HMRC for approval under the NRLS for rental income to be paid without deduction of tax.

If approved, while tax can be paid to the landlord gross, the landlord will remain subject to UK tax on the rental income received. Without NRLS approval, the tenant (or agent) is required to withhold tax from rental payments and only certain expenses can be taken into account, whereas if NRLS approval is granted, the landlord is able to deduct all allowable expenses when calculating the UK income tax due on its UK property rental income. The advantage of the NRLS is, principally, a cash flow one.

A tenant (or agent) will only be permitted to pay rental income to a non-UK resident landlord without deduction of tax once it has received written approval from HMRC to do so.

## **Upcoming Stamp Duty Changes**

As part of the Spring 2020 Budget, the government announced that an SDLT surcharge of 2% would be introduced for non-UK resident buyers of English and Northern Irish residential property with effect on and from 1 April 2021. A refund of the surcharge will be due to buyers who become UK resident after their purchase. This is an incentive to any would be overseas investors to exchange on their property purchase before the introduction of the new rate.

# OUR ESTATE PLANNING AND ASSET PROTECTION PRODUCTS:

Ai Law can assist with protecting your assets and succession. We offer the following products:

## WILLS - DOMESTIC

PRODUCT	FEE (£)
UK Will	From 250
Spouse Mirror Wills	From 485
Codicil (to make will amendments)	From 200
Will Review	£150 (£50 reduced if instruct on amendments)
Deed storage	20 pa
Professional Executors	Free Appointment

## POWER OF ATTORNEY

PRODUCT	FEE (£)
Ordinary Power of Attorney	250
Exercising Ongoing Attorney Powers as professional trustee or attorney	Bespoke.
Ordinary Power of attorney for Property Contracts	225
Signing Up To 10 Contracts	Free
Signing additional contracts above 10	20 per sign.
LPA Health and Welfare	700
LPA Property and Finance	700
LPA Combined	1,200
Acting as certificate provider	175

## COMPANY PLANNING

PRODUCT	FEE (£)
Setting Up UK Limited Entity (see our Company Agent services here: <a href="https://ai-law.co.uk/beyondlegal/">https://ai-law.co.uk/beyondlegal/</a> )	120
UK Service Address and Mail Forwarding	200 pa
Maintaining of Statutory Books (subject to annual filing)	350 pa
Corporate Nominee Service (on request)	400 pa

## INTERNATIONAL PRIVATE CLIENT

PRODUCT	FEE (£)
UK Foreign Will	From 350
UK Foreign Will Spouse Mirror	From 650
UK Service Address and Mail Forwarding	200 pa
Ordinary Power of attorney for Property Contracts	200

## UK ASSET FRAUD PREVENTION

PRODUCT	FEE (£)
Anti-Fraud Property Alert Service / (with acting as notified party)	75 / (115)
Restriction Notification	£40 plus disb
SAIL Service address for Service Charge and Rent Demands	100 pa
Declaration of Trust for Property ownership	£500+

## This Guide:

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*have any questions about this guide or anything related to it, or are unsure as to what to quote on a specific matter, please consult with the relevant senior fee-earner, partner or [info@ai-law.co.uk](mailto:info@ai-law.co.uk).*