This article is a fair and accurate report of a presentation for the ERA and may be used purely as a rough guide for readers. Each reader's circumstances will differ and they should seek independent advice before making any important financial decisions.

WILLS, PROBATE AND TRUSTS

Presentation made by HELENE BRYANT of Co-operative Legal Services

Helene Bryant reiterated that making a will is the only way people can be really sure that their assets and possessions go to the people that they want after death.

For this reason it is among the most important documents you are likely to make and should be handled professionally to ensure that it is correct. There are plenty of lawyers and reputable will-writing outlets.

While many points were covered, a few issues stuck out, such as the legal pressures on executors, the extent and costs of finding beneficiaries when people have not left wills and groups of people who are particularly exposed if they have left no will.

One group of people who have virtually no cover or protection financially without a will are co-habiting couples. While surviving spouses will inherit a certain amount of their partners' assets by right, there is no such provision for people living together who are not married, or joined by civil partnership. For this reason a will can be especially important and advice should be taken on having one written up.

An example was given of a man who died aged 43 who had been co-habiting with a woman for many years and with whom he had two children. The woman had no rights over any of his assets on his death, although they had planned to marry. She will probably live in the house and continue to look after their children, but once they are both 18, it is up to them what happens to the assets. The latest statistics presented by Co-operative Legal Services suggest that only 17% of co-habiting couples currently have wills.

It is also important to keep wills updated, especially in the cases for second marriages which might otherwise complicate the splitting up of estates.

If no will has been made by the time someone dies, they are deemed to have died intestate and then there are strict rules on whom should inherit. Full details of these can be found at the Government website www.direct.gov.uk If you type 'wills' into the search box a full list of useful details are made available.

If there is no will, it will be necessary for whoever is taking care of administering the will to apply to the Probate Registry for a Grant of Letters of Administration in order to deal with the estate.
There are clear guidelines on the order in which relatives should inherit and what percentages of the estate they should receive under intestacy.

This will not only include parents, grandparents, children, brothers and sisters, but can stretch to distant cousins.

When there are no known relatives, genealogists will be hired by the Crown to find the nearest relatives who should benefit from the intestacy. This can prove quite expensive depending upon how far the search extends. It may even extend to distant cousins living abroad. In another case recalled by Mrs Bryant, a single man had died after his parents and after his sister, who was unmarried. The Court paid genealogists who found a cousin on the mother's side, but his father was one of ten children, and so the estate was shared with 24 equally close relatives on the other side of the family.

EXECUTORS

In writing a will, an executor must be appointed. This is the person or persons charged with ensuring that the wishes of the deceased are carried out and the estate settled, ie any debts paid and any assets shared out as prescribed by the will. However, this is a tough task and can be laden with pitfalls.

Firstly executors are liable for any problems or mistakes in executing a will and can be sued. For example, if they fail to pay a creditor, especially if, for example, there are two credit card companies and they only pay one of them.

It is also up to them to sort out disputes where beneficiaries disagree on the terms of a will and believe they are not given what they are due. Again this comes back to having the document created properly in the first place. The clearer and easier it is, the safer it will be for the executor.

An executor can decline the job before it starts. However, once they accept responsibility it is almost impossible for them to get out of it and must, in virtually all cases, see it through until the end.

The probate application itself is typical of the type of problem executors have to deal with. An estate cannot be settled, or shared out, until a Grant of Representation has been granted. This Grant will not be granted until the first instalment of inheritance tax is paid on the estate. Most banks will not release funds from the estate of a deceased without a Grant.

There are ways around this but they are better known to professionals than members of the public thrust into the breach by their relatives and loved ones.

POWER OF ATTORNEY

This is set up for an individual while they are still alive in order to ensure that people they trust can deal with their financial affairs, if they are unable to manage themselves.

There are two types:

General Power of Attorney:

This is a temporary/short-lived agreement giving someone the power to deal with affairs for a short period of time. This might involve giving someone the power to deal with a house sale while the donor is on holiday.

Lasting Power of Attorney LPA
This came into effect on October 1, 2007 and replaced the ‘Enduring Power of Attorney’. It must be drawn up and prepared at the instruction of the Donor while the Donor has mental capacity. The LPA has no legal standing until it has been registered with the Office of Public Guardianship. Once registered it can be used at any time. It must also be drawn up while the ‘Attorney’ is not present to ensure that there is no duress.

There are two types of LPA:
Property and affairs LPA: This gives the Attorney power to make decisions about how the Donor’s money is spent and how their property and financial affairs are managed. The most common restriction imposed on these LPAs is that they cannot be used until a medical practitioner confirms that the Donor’s capacity is lost.

Personal Welfare LPA:
This allows the Attorney to make decisions about the Donor’s health and welfare. It is a very personal document and can extend to decisions to refuse or consent to medical treatment and even decisions on where the Donor should live.

Attorneys should be people trusted to act in the best interests of the Donor. They can be anyone, as long as they are not bankrupt. You can have more than one Attorney.

Powers of Attorney are governed by the Office of the Public Guardian.

The costs of setting up a power of attorney vary, anything from £400 upwards depending upon the provider and the amount of detail involved. Registering the power of attorney currently costs £150.

Enduring Power of Attorneys (EPA) can no longer be created, although those set up before October 1, 2007 are still valid and can be used prior to registration. However, the new LPAs were brought in as the Government decided they would be less vulnerable to abuse.

TRUSTS:
This is a very technical area and involves the setting up of trusts for wealth preservation or specific assets and sometimes to try and shelter them from tax.
For example, some trusts are set up so that assets, cash or shares can be transferred as a gift and, seven years after it is given, the capital or assets may not be liable to Inheritance Tax.
There are many specific trusts. Some, for example the minors trusts and a new 18-25 trust can be set up to ensure that youngsters do not receive an inheritance in one go. The idea is that they will be given the inheritance over a period of time which will allow them the chance to understand how best to manage the capital and assets involved.

The simplest form of trust is something like a joint bank account. However, there are many and varied trusts, each with specific rules and purposes. For this reason it is essential that professional advice is sought before committing capital or assets to a trust.

Trusts are administered by trustees. These people must be aged at least18 years and of sound mind. Trustees can be paid expenses for administering trusts, his is also covered by strict rules available at www.direct.gov.uk.
Like executors of wills, trustees are liable to be sued if it is felt that they have not properly discharged their duties.