TOP 12 CRITICAL MISTAKES TO AVOID WHEN MAKING A WILL

TIP 1-SIGNING THE WILL

"Signature" can mean the initials of the testator or, in the case of an illiterate or severely disabled person, a mark. In one case, the Court accepted an X as a signature. In another case, the Court approved a will signed simply "Your loving mother". But with a feeble signature or a mark, the witnesses will have to provide a sworn statement, confirming that the will was read over by (or to) the deceased and that he was of sound mind, memory and understanding.

A will is not necessarily invalidated simply because the signature does not immediately follow the last word or is after the witnesses' signatures - but any writing after the testator's signature is normally excluded. The Courts have ruled a will invalid where the signature of the testatrix was at the top of the page.

TIP 2-TESTAMENTARY CAPACITY:

A testator must:

- **understand** that he is making a will,
- know the **nature and extent** of his property and
- be able to **recall the people** who might be expected to benefit from his estate.

Capacity to make a will may be proved by a sworn statement from a doctor or solicitor who attended the deceased at the time the will was made. If there is a question about capacity, the Courts will decide whether a testator had testamentary capacity and the test is a legal test not a medical test

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TIP 3-A VALID WILL IN IRELAND.

For a will to be valid in Ireland, the testator must:

- be **aged 18 or over** (or be - or have been - married),
- act of his own **free will** and
- be **of sound mind**, memory and understanding
- the will must be **in writing** (oral wills for sailors or soldiers on military service are no longer permitted),
- the document must be **signed at the end** by the testator (or by someone in his presence and by his direction),
- the signature must be written or acknowledged in the presence of **two witnesses**, both present at the same time and
- the **witnesses must sign** in the presence of the testator, but not necessarily in each other's presence.

TIP 4-THE WITNESS

A witness or his spouse cannot benefit under a will. A clause agreeing a fee for drawing up or executing the will is also void if the solicitor or a member of his firm (or their spouses) act as a witness. An executor who acts as a witness will lose any benefit.

A person who signs a will merely to show that he agrees with its contents, may benefit (although the will should indicate that this is the case). And a witness or spouse may benefit where:

- the legacy is given as a **legal or moral duty** of the testator (such as a debt),
- the benefit is given **in trust** for someone else,
- the benefit arises from a **secret trust**,
- the beneficiary and the witness married **after** the will or
- the legacy is confirmed in a **subsequent codicil** witnessed by someone else.

TIP 5-CONTENTS OF THE WILL

A will should contain:

- the testator's **name and address,**
- a **revocation** clause,
- a clause appointing at least one (but preferably two or more) **executors,**

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- a list of **legacies** (gifts of money or goods),
- a list of **devises** (gifts of real property),
- a **residuary** clause, disposing of the remainder of the estate ,
- the **date,**
- the testator's **signature and**
- the **attestation clause** or *testimonium* together with the witness signatures.

Tip 6-Residuary Clause.

Without a residuary clause, any property not specifically referred to would pass according to the rules of intestacy and, if any of the other specific gifts should fail, the property involved would become part of the residue.

Tip 7-Marriage and Wills

If a testator is married, he or she must make proper provision for the other spouse and children. If there are no children, a surviving spouse has a right to half the estate, including the family home. If there are children, he or she has a right to one third of the estate. This right is called 'the legal right share'. If a testator has disposed of property within three years of death in an attempt to disinherit a spouse or children, the court may rule the disposition void.

Tip 8-Legal Right Share

A spouse's "legal right" has priority over any other bequests, although it may be renounced in writing at any time while the testator is still alive. A spouse who has deserted or committed a serious offence against the testator or his/her children loses the right to a share in the estate. The legal right may be extinguished by agreement or following a judicial separation and will disappear after a divorce.

A husband and wife's mutual rights to succeed to each other's estates may also be extinguished by the Court at any time on or after a decree of judicial separation, under the Family Law Act 1995. (Succession rights are automatically extinguished after a divorce, as the couple are no longer man and wife. Where a marriage is void, the partners are not spouses and these provisions also do not apply.)

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TIP 9-CHILDENS SHARE.

If the testator failed to make proper provision for any children in the will, a child (of any age) may bring an application under section 117 of the Succession Act within six months from the first taking out of representation. The Court will consider the application from the point of view of a "prudent and just parent", taking into account:

- the amount left to the **surviving spouse** (or the value of the legal right),
- the **number of children** of the testator,
- the **ages and positions in life** of the children at the testator's death,
- the testator's **means**,
- the applicant's **age**,
- the applicant's **financial position** and prospects and
- any other **provision already made** by the testator for the applicant.

A child who has been found guilty of an offence punishable by two years' imprisonment or more against the deceased (or any spouse or child of the deceased), may not make a section117 application.

TIP 10-FAILED BEQUESTS.

In the case of a legacy payable out of specific funds (such as *'I give to my nephew Ross the sum of €1,000.00 from my AIB account'*) if the source of the legacy (the money) does not exist at the date of death, the legacy will be extinguished or adeemed. If, on the other hand, the source of the legacy has ceased to exist, but the residue is enough to cover the legacy, it may be paid out of the residue.

A legacy may fail where:

- the beneficiary **dies first** (unless an exception applies),
- the gift is void for **uncertainty**,
- the subject matter is **adeemed** or
- the legacy **abates**, due to insufficient assets.

"Ademption" happens where the testator leaves a specific asset (for example a work of art) but sells it before dying. **"Abatement"** means the legacy has to be reduced because there are insufficient assets to cover all the dispositions. The abatement may be *pro rata*.

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TIP 11-REVOCATION OF A WILL

A will may only be revoked by:

- A **subsequent marriage** - unless the will is made with that marriage in mind,
- A properly-executed **later will** or codicil which expressly revokes all earlier
- testamentary dispositions,
- A **declaration in writing** of intention to revoke the will or
- A burning, tearing or **destruction** by the testator, with the simultaneous
- intention of revocation.

An earlier will is *only* revived by re-execution or a duly-executed codicil. A declaration of intent to revoke a will must be executed in the same way as a will. A letter to a banker or solicitor who holds the will, asking him to destroy it, would revoke the will, whether or not it was actually destroyed. If no other will is executed, this would produce an intestacy. A will may be destroyed by someone in the testator's presence and by his direction.

TIP 12-LOST WILLS

If the original will has been lost, advertisements should be placed in suitable newspapers to try and find it. A copy will is not normally acceptable, in case the original will was revoked - perhaps by destruction. But, if a copy exists, the High Court may be asked to admit the copy to proof. The solicitor or person who made the copy will must swear that it is authentic. If no photocopy or carbon copy of the original exists, someone with means of knowledge (such as a person who has the original on computer disk) may give evidence so the will can be reconstructed.

TIP 13- THE 'GIFT OVER'

S98 Succession Act 1965 says:

'*Where a person, being a child or other issue of the testator to whom any property is given (whether by a devise or bequest or by the exercise by will of any power of appointment, and whether as a gift to that person as an individual or as a member of a class) for any estate or interest not determinable at or before the death of that person, dies in the lifetime of the testator leaving issue, and any such issue of that person is living at the time of the death of the testator, the gift shall not lapse, but shall take effect* ***as if the death of that person had happened immediately after the death of the testator****, unless a contrary intention appears from the will'*.

This relates to a situation where you make a will leaving a gift to a child, and that child dies before you, leaving a child (your grandchild) surviving and alive at the date of your death. You

would expect that the gift would pass to your grandchild but under this section of the Succession Act 1965 this is not the case. Your gift will pass into the estate of your deceased child and will be distributed in accordance with the terms of his or her will if there is one or if not in accordance with the rules of intestacy – that is to the next of kin.

Therefore, if it is your intention that the grandchildren receive the bequest of a child that may predecease, you then this needs to be specifically stated in your will. This is called 'the gift over'.

You should consider including a ***gift over*** in respect of all bequests in the will as there is always the risk that a beneficiary may predecease you.

If you would like to have a chat about making your will or updating an old will, why not contact Eoin O'Shea Solicitor of O'Shea Legal for a friendly chat about how to plan your will in a tax efficient manner. Eoin has a Diploma from the Law Society of Ireland in Trusts, Taxes and Estate Planning and is an expert on will drafting and probate matters.

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