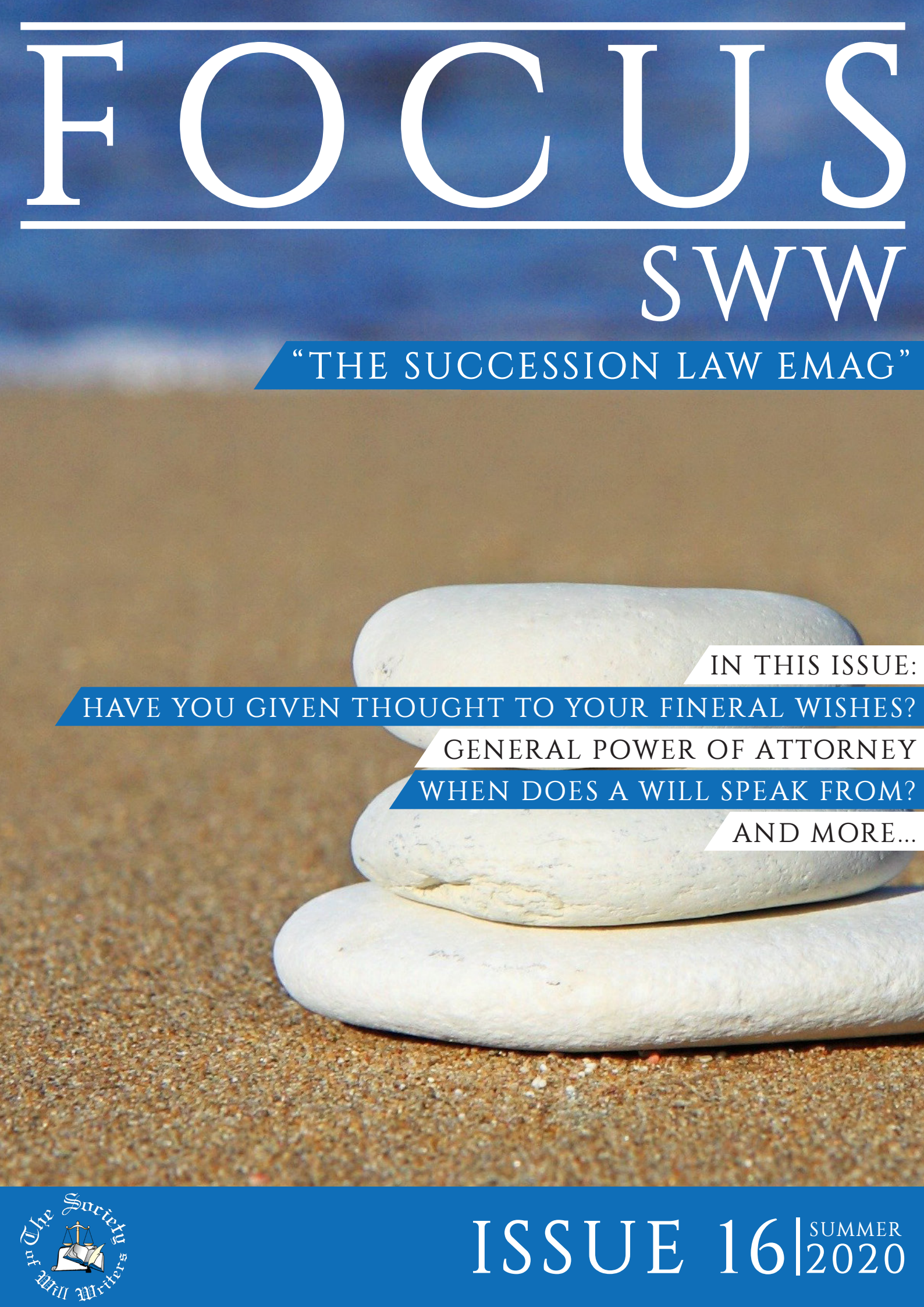
FOCUS SWW

"THE SUCCESSION LAW EMAG"



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The Society of Will Writers

ISSUE 16 | SUMMER 2020

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A letter from the Editor

Dear reader,

Welcome to the latest issue of Focus SWW. This Summer issue marks the 4th anniversary of this magazine, and to this date, it remains the only free succession law emagazine catering to both the public and the professional.

Before I go any further, I'd like to pay tribute to our recently deceased Founder and Director General of 24 years, Brian McMillan. Those of you who knew Brian personally will agree that his impact on us all, as well as our industry, is immeasurable. Brian was instrumental in steering the profession in the right direction, for which I am sure many of us would not be where we are today without his efforts. He leaves behind a legacy which the Society's team, our members, and our partners are now responsible for carrying on. He cared so incredibly much for his work, and I, along with all of us here at the Society aim now to aspire to the same.

It's fair to say that 2020 has been a whirlwind year for us all, of course with Covid-19 having a significant impact on our lives in many different ways. Whether this is on a personal level or as a business owner, we have each had our own obstacles to overcome as we join together in the fight against the virus. Now as August approaches, we're seeing more businesses opening, more social activities becoming available and of course the opportunity to spend more time with our loved ones.

I think what has perhaps impressed me the most out of all of this is the resilience of those working in our own industry. Starting here at the Society's head office, the team have worked tirelessly to ensure continuity of our services, for which I am so very grateful, as I'm sure our members and their clients are too. Secondly, I have to applaud our members for their own efforts in ensuring that clients don't go without documents, that they continue to provide a full range, or as full a range of services as possible, and also for their efforts in keeping up to date with the Society, the guidance that we're issuing, and for the most part simply "getting with the times" so to speak.

I don't think I'd be wrong in saying that we're not out of the woods yet. I think over the coming months we're all going to need to continue to do what we can to remain safe and to keep our families, friends and colleagues safe too.

We've seen a dramatic increase in the number of people taking up estate planning services, which, with all the news has been no surprise in all honesty. There has been a steady increase in recent years of people getting their affairs in order, however, there's still further to go. A Will is one of the most important documents you'll ever have, it's capabilities are not to be underestimated so for your own peace of mind and that of your loved ones, please speak to a member of the Society today to put these plans in place.

All things aside, I hope that the Summer brings you good weather, good company and good health and I look forward to writing to you again in the Autumn issue.

Anthony Belcher
Director
The Society of Will Writers and Estate Planning Practitioners

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WANT TO MARKET YOUR BUSINESS WITH THE SWW?

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To find out more information, or to see our media pack and rate card, please contact either anthony@willwriters.com or call 01522 68 78 88

Quarter, half and full page adverts are available within Focus SWW.
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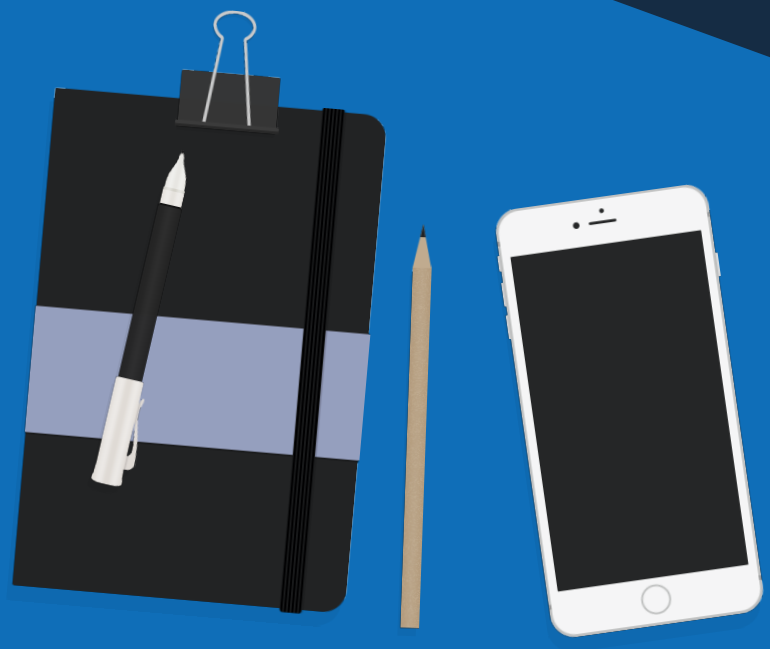

Safe to do business with

Code Compliant

Two heads are better than one – The Society of Will Writers working with Skipton Building Society

When organisations work together they often produce better outcomes. Not only for themselves, but most importantly, for their clients.

Working together allows for an open mindset. It allows for change – often for the greater good.

Take Blockbuster for example. In the early 2000s Blockbuster were given the opportunity to purchase a little-known company called Netflix. Unfortunately, at the time Blockbuster did not believe the DVD-by-mail company would be a good asset to invest in.

Blockbuster didn't recognise that by harnessing together their own strengths with those of Netflix, they could grow to provide an enhanced service for their customers.

Here at Skipton Building Society, we believe we could help you to provide an additional service for your clients.

And that's why we're thrilled to have started working with The Society of Will Writers, to support organisations like yours.

We might be a far cry from providing clients with their Saturday night action movie fix. However, we are two organisations that have one common goal – being able to provide clients with peace of mind over their financial futures.

As Estate Planners and Will Writers you carefully guide your clients through the important process of planning their legacy. You provide them with peace of mind about their future plans for when they're no longer here.

SKIPTON BUILDING SOCIETY Since 1853 | financial planning & advice

At Skipton Building Society, we offer advice on investment and pension planning. We're here to help people achieve their future financial goals. Not only will your clients have peace of mind their financial affairs are in order for when they're no longer here, but Skipton could also provide them with the support to plan their future finances – so they have a stronger legacy to leave behind. We could be the icing on the cake.

Why Skipton?

We're a long-standing mutual building society that has been providing a financial advice service for over 30 years. And 95% of financial advice customers asked said they would recommend us to a friend or family member.

As a building society, we've been providing different generations a good place for their savings, as well as helping them own homes too, since 1853.

Our mutual roots have kept us grounded all these years. We don't have to answer to shareholders, instead we're shaped by our members who vote on the way we operate. It's important to us that they have a voice.

We've recently made some exciting changes to the way we offer financial advice

Times are changing, 2020 so far is a testament to that. Yet our commitment to helping people plan for the future has stayed the same.
In order for our business to continue to remain relevant and sustainable for the future, we decided to review the way we offer financial advice.

We believe more people should have access to expert financial advice so they could make the most of their money. That's why we now offer a range of solutions for a range of different people, needs and circumstances. There's no one size fits all from us.

Our friendly, expert advisers take the time to get to know their clients. They work hard to build long lasting relationships and provide solutions that work now and in the future.

Our financial advice service is different

Many other organisations require customers to have a large amount of savings already, ruling thousands of people out. Here at Skipton, we offer financial advice to anyone with £20,000 or more to invest or re-invest. It's part of our mission to offer the right financial help to as many people as possible.

And with 76% of UK workers unaware how much their pension is worth, we also provide the important service of a full pension analysis for anyone with a pension pot with £50,000 or more in.

We offer accessible advice

With over 120 financial advisers, and 88 branches located across the country, we can see your clients in their home, in branch or through our award-winning video service, better known as Skipton Link.

Our Skipton Link video chat service allows clients to still receive all the personalised and high-quality benefits of an in-branch appointment – for example, the software was developed so that our advisers can still show any important documents needed for a meeting by displaying them on the screen. Importantly, it's also secure and easy to use.

Skipton Link has proved vital towards being able to continue offering our clients financial advice throughout the coronavirus pandemic. Of course, many clients would prefer a face-to-face appointment. However, coronavirus has forced us all into a situation where we have to adapt how we do things. Pleasingly, we have seen more and more customers embrace our Skipton Link technology. Across May 2020 we completed ten times as many appointments as we did in May 2019 over Skipton Link.

Sarah, a client who has recently had a Skipton Link appointment stated, "Skipton Link is something I would recommend. And even for someone like myself, who's in their 70's, I found the whole process simple and easy to follow. I will actually continue to use this video service when things go back to normal."

There's no upfront fee for your clients to receive our personalised recommendations. The journey simply starts by us telling them how we can help. This means they'll only have to pay a charge if they decide to act on the advice.

"At Skipton we offer a financial advice proposition that allows us to provide clear and accessible financial advice to more people. I am delighted that by working with the Society of Will Writers we can help make financial advice accessible to more people when they need it. Especially at such an important time as writing their Will" – *Paul Fenn, Skipton's head of Business Development*

So, now you know a little about Skipton, let's work alongside each other to help your clients even further. To find out more contact Kevin Crawford, Business Development Manager on 07816955491 | kevin.crawford@skipton.co.uk.

Capital at risk

*Source: 2058 customers surveyed December 2017-March 2019

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HAVE YOU GIVEN THOUGHT TO YOUR FUNERAL WISHES?

Did you know that you can include your funeral wishes in your Will? Many people are of the belief that the purpose of having a Will is to name guardians to look after your children, split residue to your loved one (or charity in some instances) and to make specific gifts, naming but a few.

A Will deals with more than you may realise. However, it is important to add that any funeral wishes in the Will are not legally binding as your executor will be the one to make arrangements for your funeral. However, if instructions are left with them, it is likely that any funeral wishes you make will be respected. Family are also likely to feel very assured that the funeral arranged for you was in accordance with your wishes.

What options do you have?

- Buried
- Cremated
- Woodland burial

Woodland burials are something which are becoming more and more popular. A woodland burial is essentially an environmentally friendly option to the normal burial and cremation. The body is not embalmed and takes place in natural burial grounds. A biodegradable coffin is used and is normally made from recycled paper, willow or wicker.

Instead of a headstone, the burial is normally identified by flowers or a tree. Many burial grounds also have a map so family can visit the site of the deceased.

Essentially the instructions you leave for your funeral can be very detailed or quite brief as this is very much dependant on your wishes. Some may express the wish to be cremated and their ashes to be scattered in a particular area and some may wish for a particular service.

Here are some factors you should consider:-

- whether you wish to be cremated or buried
- where your funeral should be held
- where you want to be buried
- where you would like your ashes to be scattered
- whether you want flowers or donations at your funeral
- how attendees should dress at your funeral
- whether there will be any music

If you would like to leave quite detailed instructions for your funeral, it would be best to set this out in a separate letter of wishes and have the Will simply state whether you wish to be buried or cremated. Whilst a letter of wishes is not a legally binding document, an advantage of this document is that it does not need to take a particular form and can be amended at any time providing it is signed by you.

Unique Funerals

Attending a funeral can be quite a sad affair where people are expected to wear black dress clothes or dark coloured clothing.

For some this is not how they want their send off to be and it is known for there to have been some rather strange requests. The most common request is for people not to wear black or instead come dressed in bright clothes, fancy dress and one Glastonbury fan even requested that everyone who attended his funeral to wear wellies to celebrate his love for the Glastonbury festival. Let's look at some more examples:

- **Tupac Shakur** – he was one of the most famous and influential rap artists. After his death his friends mixed some of his ashes with marijuana and smoked them.
- **Abraham Lincoln** – after his assassination, his body was sent by train from Washington DC to Springfield Illinois making stops along the way for people to pay their respects.
- **Genghis Khan** – it is thought that his funeral procession carried his body back to Mongolia, slaughtering anyone they met along the way so his final resting place remained secret. It was alleged that soldiers killed everyone present at his funeral and were then killed themselves.
- **Alexander the Great** – Alexander died in Babylon and requested that his body be thrown into the Euphrates River
- **Evel Knievel** – his funeral was held in a stadium that could seat 17,000 people and also involved fireworks.
- **Frank Sinatra** – his funeral took place in Beverley Hills with around 100 photographers and 1000 onlookers. At the end of the funeral his friends placed a bottle of whiskey, a zippo lighter and ten dimes into the casket.

You may decide you are more than happy to leave the decision to your loved ones which is perfectly fine. Alternatively, you may be influenced by some of the "out of the box" funeral ideas above and start to plan a "wild and wacky" funeral so you can leave this world in the best way you possibly can.

In reality the funeral may be carried out before the Will is even retrieved in most instances so please also let your closest family members aware of your funeral wishes so these can be followed.

WHAT IS AN ADVANCE DECISION AND SHOULD I CONSIDER ONE?

You may not have heard of an Advance Decision before but they're a very powerful document for anyone who has strong feelings about what medical treatment they would want to receive, and would want to make sure that their wishes were followed even if they were in a state where they couldn't make treatment decisions for themselves.

These documents are commonly also referred to as a 'Living Will'. Don't be mislead by that term though, these documents are nothing to do with your Will and can't be used to deal with your assets. They are solely for decisions about your medical treatment.

What can an Advance Decision do?

An Advance Decision is a means of making sure your family and the professionals providing treatment to you know what your personal wishes for that treatment are even when you are unable to inform them yourself. This may be because you have lost capacity as a result of an illness such as dementia, or even due to a temporary lack of consciousness brought about by an accident.

If you feel strongly that you would not want to receive particular types of treatment in certain situations then this can be included in your Advance Decision. If you then find yourself in a situation that

your Advance Decision applies to, a doctor would not be able to provide that treatment to you. A common example would be a person who would like to refuse blood products because of their religious beliefs.

What *can't* an Advance Decision do?

You can't use an Advance Decision to request certain types of treatment. While everyone has the right to refuse treatment, even if it results in their death, no one has the right to insist on a particular treatment.

While you can refuse treatment accepting that this refusal will result in your death, you can't use this type of document to ask or encourage someone to actually help you end your life. Assisted suicide is illegal in England & Wales.

Are they legally binding?

As long as they are drafted and signed correctly, and actually apply to the situation you are in at the time the decision to administer treatment needs to be made, Advance Decisions are legally binding. To make one you need to have mental capacity to make these kinds of decisions and you need to be over 18.

To make sure your Advance Decision is legally binding it also needs to meet the following requirements:

- It must be in writing and signed by you.
- If it makes decisions about refusing life sustaining treatment it also needs to be signed by an independent witness – someone who has no interest in your estate, and include a statement that you wish the Advance Decision to apply even if your life is at risk.
- It must clearly state what treatment you would refuse and in what circumstances it applies.

We would always advise that you seek advice from a professional when making an Advance Decision rather than trying to draft it yourself. This way you can be sure that it will be drafted correctly.

The last requirement is that for it to apply you can't have said or done anything while you still had capacity that contradicted the statements you'd made in the Advance Decision. This isn't something that can be accounted for within the Advance Decision itself of course, but it does mean that it's best practice to frequently review your document. Some drafters will include a 'review' section on the last page where you can sign and date your Advance Decision at regular intervals to confirm that you've reviewed it and you are still happy with it.

Anything else I need to know?

We've already said that an Advance Decision is a powerful document, but it's not of much use to you if no one knows it exists. We strongly recommend that a copy is given to your doctor to place on your medical records so they are aware of it if you need any treatment. We also recommend that you make your family aware of it as well and discuss it with them, although this may be difficult.

Our previous article on the case of Brenda Grant highlights just how important this is, and you can find it here: https://www.willwriters.com/blog/family-receive-pay-hospital-fail-act-accordance-advance-directive/

GENERAL POWER OF ATTORNEY

With the ongoing coronavirus pandemic many people are understandably concerned about getting documents in place to allow someone else to make decisions on their behalf and manage their financial affairs. With many vulnerable people currently being advised to self-isolate this means having an attorney to carry out certain tasks on their behalf is incredibly useful.

Normally when we think of powers of attorney we think of Lasting Power of Attorney (LPAs). These documents allow a donor to appoint attorneys to make decisions on their behalf should they lose capacity to make their own decisions. They can be made to appoint someone to make decisions about health and welfare as well as property and financial affairs. In the case of managing financial affairs an LPA can also be used while the donor still has capacity to make their own decisions, making them useful for someone who has mental capacity but maybe still needs a bit of extra support.

General Powers of Attorney (GPAs) are very different. This type of document can only be used by a donor wishing to appoint an attorney to manage their financial affairs and is only valid while the donor has mental capacity. As soon as capacity is lost the GPA is no longer useable and the attorney can't make any more decisions for the donor.

SO WHY CHOOSE A GENERAL POWER OF ATTORNEY RIGHT NOW?

At the moment LPA applications are progressing quite slowly. The Office of the Public Guardian is doing it's best to process applications within their target of 40 days, but like many companies right now they are running on reduced staff. This means that it's taking longer to get an LPA registered, and if there are any issues with it it's currently difficult to contact the OPG by phone.

The more pressing issue though are the barriers to getting the LPA completed in the first place. Completing an LPA requires a donor, a certificate provider, at least one attorney, and a witness to witness the donor and all attorney's signatures. In an ideal world the certificate provider could act as the witness to all people involved limiting the amount of people who need to be involved in the signing, but even without the current social distancing rules managing to gather the donor and all of their attorneys together is a rare occurrence, with attorneys often living far away from the donor.

For a person who needs someone to make decisions for them right away a GPA can be a great alternative currently. There is no registration requirement, so the document is ready to use as soon as it has been properly signed. There are also less people involved in the creation of a GPA. The only people who need to sign are the donor themselves and a witness. There is no need for a certificate provider, and no need for the attorney to sign.

The GPA is executed as a deed poll by the donor, so the rules on who can act as a witness for them are not strict. The witness must be over 18, have capacity, and can't themselves be a party to the deed. The attorney isn't strictly a party to the deed as they aren't a signatory, but it is still best to avoid them acting as a witness. What this does mean though is that someone else in the household could act as the witness, allowing the document to be made without placing anyone at any risk.

WHAT THIS DOESN'T MEAN...

This doesn't mean that LPAs should be forgotten about altogether. Since a GPA ends if the donor loses capacity it is still best to make sure that steps are being taken to get an LPA put in place as soon as it's possible to do so.

CAN EXE REM

Executors have a legal duty to administer the deceased's estate. They must make sure assets are identified and called in, debts owed by the deceased are paid, any taxes are declared and paid, and the assets are distributed to the right people according to the deceased's will. Executors are expected to carry out their duties with due diligence, acting within the best interests of the estate, and also within a reasonable period of time. Complimentary to this duty on the executors is the beneficiary's right to ensure that the estate is properly administered.

So, what happens if an executor is failing in this duty? The main problems a beneficiary may face are the executor's unwillingness to act at all, or an executor failing to carry out their duties correctly. In either case a beneficiary may apply to the court to have the executor removed or substituted. The first steps should be to attempt to communicate with the executor to resolve any dispute without any court intervention but if mediation fails then applying to the court for a resolution may be the only option.

WHAT IF AN EXECUTOR REFUSES TO ACT?

If an executor refuses to take any steps to apply for probate and administer the estate but also refuses to renounce their role so that someone else may take over then this leaves the estate in a state of limbo. To resolve this a beneficiary may apply to the court for them to issue a citation to the offending executor. This citation orders the executor to either accept or refuse the grant of probate. If the cited executor fails to appear then all of their rights in relation to the executor appointment cease. The next person entitled to take out the grant can then do so, and administration of the estate can take place.

This form of citation is only possible if the executor hasn't 'intermeddled' in the estate. This is where the person has taken on some of the duties of an executor such as receiving the deceased's assets or settling debts.

WHAT IF AN EXECUTOR IS NOT PROPERLY ADMINISTERING THE ESTATE?

If a beneficiary has concerns about the executor's handling of the administration and they haven't been able to resolve them informally or through mediation then they may look to have the executor removed. Removing an executor is not an easy thing to do. Each case will turn on its own facts, but what must always be demonstrated to the court is that there are compelling reasons for the removal. Common examples of this are:

- The executor is unfit or unable to act, possibly due to mental incapacity, imprisonment, or bankruptcy.
- The executor is failing to administer the estate properly or failing to progress with the administration.
- The executor has committed some serious misconduct that is causing or could cause loss to the estate. This may be stealing from the estate, wasting assets, or acting dishonestly.

A personal disagreement or hostility between the executor and beneficiaries is not often grounds enough to remove an executor. The hostility must be so severe that it obstructs the proper administration of the estate for the courts to consider removing the executor.

I AN CTOR BE IOVED?

POWER OF THE COURTS TO REMOVE AN EXECUTOR

If the grant of probate hasn't been taken out then the courts can rely on section 116 of the Senior Courts Act 1981 to pass over an executor and appoint an administrator to replace them.

The courts also have a power to remove or substitute an executor under section 50 of the Administration of Justice Act 1985. This power can be used both before and after the grant has been taken out. They can remove the executor and appoint a replacement. If appointing a substitute executor the courts will often choose to appoint a professional at that point.

The courts may also choose to simply terminate the executor's appointment without appointing a replacement. They will only do this if it would still leave at least one suitable executor to administer the estate, or at least two in cases where two are required.

If you are a beneficiary of an estate and you're having difficulties with an executor your first steps should be trying to communicate with the executor to resolve this with them informally. If you have concerns about how the executor is administering the estate you should write to them to request they provide an account of the administration. If you still aren't satisfied then it's at this point you should consider taking further action. If further action needs to be taken make sure you contact a suitably qualified probate specialist for advice.

*Please note that this has only covered executors. Where the deceased died leaving no will and administrators were appointed some procedures may slightly differ.

When does a Will 'speak' from?

The construction of a will can alter the date from which it 'speaks'. This is an important factor in interpreting the will as a small change in the wording of a will can change the way ademption applies. So, we need to know what the ordinary rules are concerning when a will speaks from.

The rules differ depending on whether we are talking about subject matter (assets) or objects (beneficiaries).

Subject Matter

When talking about assets the will speaks from death. Section 24 of the Wills Act 1837 provides that:

"24. Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

A gift in a will of 'all my vinyl records' would therefore include any records the testator owned at the time the will was executed, and all after-acquired records that they own at their death.

So why is this important? Firstly, this means that the subject of a wide specific legacy like the example above is susceptible to increasing or decreasing between the date of the will and the date of death. A good argument for keeping a will under review.

Secondly, if this doesn't match the testator's intention then we know we need to word the gift differently to do something about it. Section 24 applies subject to any contrary intention, so it's possible to word a gift in such a way that the will speaks from the date of its execution instead of from death.

Objects

When it comes to defining beneficiaries, the will speaks from the date of its execution unless there is any contrary intention, so be aware of this when referring to individual beneficiaries by only their relationship to the testator. This rule does not apply to class gifts, where the members of the class are ascertained at death (or in some cases between the testator's death and when the class closes, but class closing rules are a different matter).

Of course, this rule doesn't apply to beneficiaries who are identified by name so it should only be in rare circumstances that this rule causes any problems!

A gift made to a person identified by description takes effect as a gift to the person that met that description at the time the will was executed, not at the time of the death. In simple terms a gift "to my cleaner" will be a gift to the person who was the cleaner at the time the Will was made.

If at the time the will was executed there was no one who met that description then the gift goes to the first person after execution who meets that description, or otherwise lapses. So if a gift is made "to my daughter's husband" but at the time the will is executed the daughter is unmarried the first person to come along and meet that description is the beneficiary. Again though this presumption can be budged with contrary intention so that the will would speak from death instead, for example "to my daughter's husband at the time of my death".

For a case example of this see Peasley v Hallingbury [2001] which left a right of occupation to a great niece and 'her husband'. This was construed to mean the husband of the great niece at the time the Will was made and not her husband at the date of death – obviously very unfortunate for that husband!

If a later codicil is executed this will reconfirm the contents of the will and 'republishes' it. This will mean that the will speaks from the date of the codicil instead when referring to the beneficiary.

THE NICHE ISSUE OF

Jointly Owned Property & Lasting Power of Attorney

When a couple is thinking about making an LPA for their property & financial affairs it is quite common for them to want to appoint each other as their attorneys. Often, they want to appoint each other as sole attorneys initially. While they may be happy for their children or other trusted people to act too, it is common that they only want them to act if the spouse becomes unable to. This is usually a sensible enough approach, but there is one small issue that clients should be made aware of. There can be difficulties if the property needs to be sold after an owner has lost capacity.

WHAT IS THE ISSUE?

Trusts are pervasive in English & Welsh law. While it is not something we tend to consider in our day to day life, it is a fact of land law that every property that is jointly held is held on a trust of land. The joint owners of the property hold the property as trustees, in most cases on trust for themselves either as joint tenants or tenants in common.

Where a property is held on a trust of land at least two trustees are required to give good receipt for any capital arising from its sale. This is where we face problems with joint owners of property appointing each other as their sole attorneys. Two distinct signatures are required on the transfer documents, so an attorney cannot sign both for themselves in their capacity as a trustee, and also for the incapacitated owner in their capacity as their attorney.

HOW IS THIS RESOLVED?

The attorney will be the continuing trustee as they are still a capable co-owner of the land. Where the attorney is a continuing trustee the Trustee Delegation Act 1999 allows them to appoint a new trustee to act with them solely for dealing with the property transfer. Once the property is held by two capable trustees it can be sold, as good receipt can now be given.

So, in reality it's a minor nuisance and easily worked around but being faced with this issue unexpectedly as an attorney can certainly be daunting. If clients own their property jointly and wish to appoint each other as sole attorneys it is therefore best that they are made aware of this.

Of course, the easiest way to avoid this issue at all would be for them to consider naming an additional attorney to act alongside the other spouse. This way there would always be two separate trustees able to sign any transfer documents, as the joint owner could sign for themselves and the incapacitated owner's other attorney could sign on their behalf. This avoids any panic or delays when it comes to selling the property after an owner has lost capacity.

WHAT TECHNOLOGY COULD MEAN FOR THE FUTURE OF WILLS

Over the last few months Will Writers across the UK have been experiencing some unique challenges when it comes to taking instructions for Wills and having them executed. Frustratingly for many, these are problems that could be easily overcome by the technology we have today if only the law allowed for it! This has given us cause to think on just how this could have a lasting impact on how we write wills, so in this purely speculative piece we will be looking at what the future of Will Writing may look like. This will be all based on suggestions for reforms made by our own Law Commission as well as what other countries with similar legal systems to our own already do.

ELECTRONIC WILLS

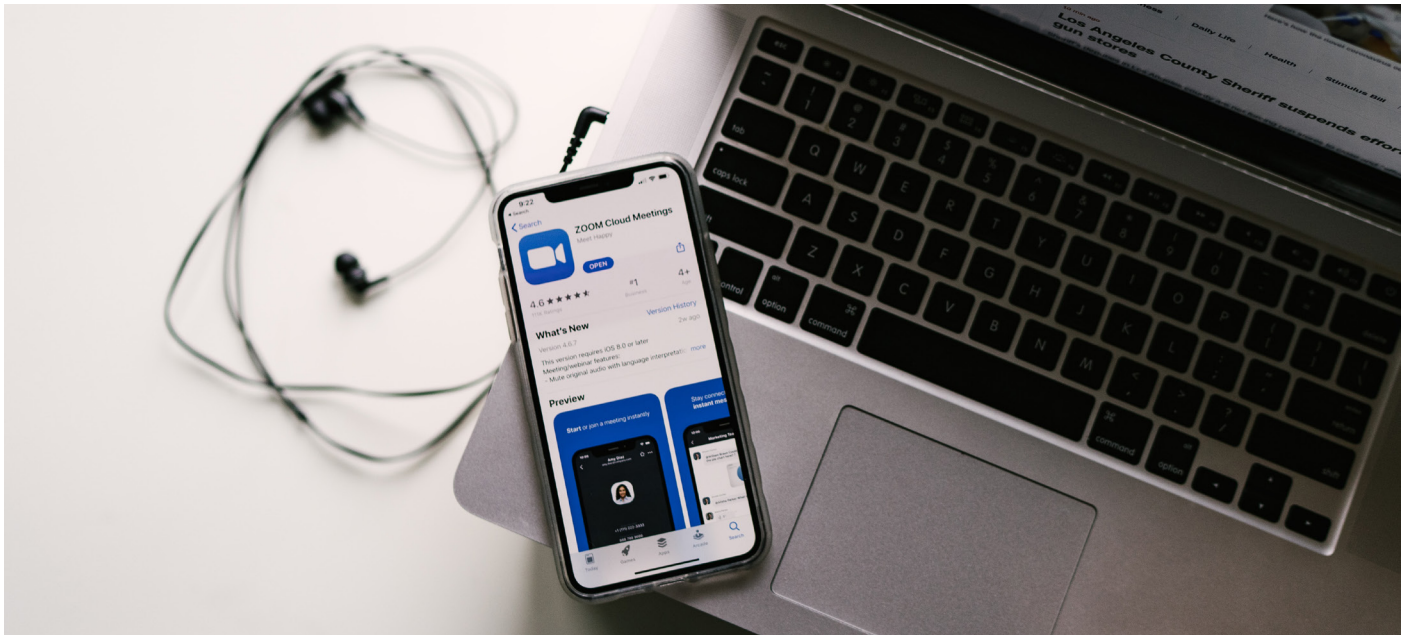
To meet the formality requirements of section 9 of the Wills Act 1837 a will must be in writing. "In writing" extends to documents prepared electronically using a word processor or will writing software, but at some point it must be printed and sent to the client to be executed. A wet ink signature by the testator and their two witnesses is required.

People are become increasingly reliant on technology and expect to be able to manage many of their affairs online; from mobile banking to managing billing accounts online, so why not their Will?

In a consultation paper published in 2017 titled 'Making a Will' the Law Commission made many proposals for modernising succession law. Among them was a suggestion for developing this area of law so that wills could be validly executed electronically. This would make the whole process digital and introduce 'electronic Wills'. This would open up a more convenient method of will drafting for people by allowing the whole process from giving instructions to receiving and signing the will to be completed completely remotely.

ELECTRONIC SIGNATURES

For electronic wills to work legislation would need to be introduced to recognise electronic



signatures as a valid method of signing a will. Electronic signatures are already perfectly valid in many other areas and have been recognised since 2000 when the Electronic Communications Act 2000 was introduced, though updates have been made since by the Electronic Identification and Trust Services for Electronic Transactions Regulations 2016 (eIDAS). These mainly relate to recognition of e-signatures in relation to commercial transactions though. Wills are not contracts, and it has previously been made clear that these regulations don't apply to them. So it seems that signatures on wills are held to a higher standard and there are various methods of making an e-signature, so determining which is secure enough for signing a will is a challenge in and of itself.

In terms of security the e-signature must be more than the testator's name simply typed. This is too susceptible to fraud as any electronically typed name looks the same no matter who types it. Similar problems apply to digital images of written signatures. The Law Commission suggested that more complex methods would be required such as biometrics or encryption-based signatures that could be linked to the testator more reliably. Considering the weight that has been attached to "handwriting forensics" in previous will disputes, an e-signature must be at least as secure as handwritten signatures.

It would also need to be considered how such a signature could be validly witnessed.

REMOTE WITNESSING OF WILLS

In the current climate of social distancing, and for some social isolation, the topic of remote witnessing of wills is a hot one. Under the current law two witnesses need to be physically present when the testator signs his or her will. This has always been interpreted as being in the same room and having line of sight of the testator making their signature, although there are some old cases being dragged to the forefront again where this physical presence requirement has been satisfied by witnesses watching through the window.

We've written on this previously here: https://www.willwriters.com/blog/coronavirus-attestation-wills/

Since this last article the Law Society have announced that they are in talks with the Ministry of Justice about what emergency measures can be put in place to overcome the problems we are facing with validly signing wills at the moment. One suggestion is legislation to allow for these strict witnessing requirements to be relaxed to allow for remote witnessing via video conferencing apps like Skype or Zoom. This overcomes the physical presence issue.

Interestingly, Scotland have already taken this exact approach. The Law Society of Scotland recently updated their guidance to state that if a suitable witness can't be physically present when the testator signs then it is acceptable for the solicitor who drafted the will to witness the testator signing the will by video link. The

testator can then send the will to the solicitor who can sign it themselves upon receipt, and the will would be valid. In their words, "We would anticipate that this would be deemed to form one continuous process as required by the legislation."

OTHER TECHNOLOGICAL ALTERNATIVES

Another option the Law Society and MOJ are said to be considering is an Australian style approach to the interpretation of what constitutes a will.

The validity requirements for Australian wills largely mirror our own with regards to signing and witnessing. In some states in Australia though, the courts have discretionary powers to dispense with these validity requirements and admit a will to probate even if it is in a 'non-traditional' form. They may do this if they are convinced that the testator intended the non-traditional document to take effect as their will. This has led to cases where letters that have not been witnessed and typed up but never printed documents have been admitted to probate, and in at least one case a video will being allowed.

Perhaps the most surprising use of this power was seen in Queensland, where an unsent text message saved in the drafts of a man's phone was held to be his valid will, written shortly before he committed suicide and left in a place where it would be easily found.

If our courts adopted a similar system it would allow a lot more documents to be treated as valid wills. It would place more weight on the deceased's intention that the document take effect as a will, and less on the formal signing requirements. This could mean that a document that on the face of it looks like a will but fails as it wasn't correctly witnessed, could still be admitted to probate. The obvious pitfall of this approach though is that it relies on the courts approving such a document.

The ongoing Covid-19 pandemic has forced many of us to change our working habits, especially in this industry where we mostly have to work face to face with clients, many of whom are vulnerable. When the option to simply visit a client is taken away very suddenly like this it is obviously hard to adapt. For many people it has also called into question the suitability of the current law on drafting and executing wills, and how it could be adapted to more modern times. After all, the legislation we rely on is nearly 200 years old and clearly could never have anticipated a future where documents could be produced and signed electronically, or where a person could still clearly witness a testator's signature despite being miles away. If anything, it's certainly an argument that the suggestions for modernising succession law that the Law Commission made back in 2017 should be brought back to the forefront after being put on hold in 2018. If any changes to legislation do come about as a result of this pandemic, it would be interesting to see what lasting impact they have on the future of will writing.

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If you have any questions about Wills, or any of the content in this magazine, please contact The Society of Will Writers:

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Philippa

Contact the Society of Will Writers for further details

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