A Guide to Estate & Succession Planning.

Wills, Enduring Powers of Attorney, Assisted Decision Making, Fair Deal Scheme & Administering Estates.

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WILLS

WHAT IS A WILL?

A Will is a legal document detailing how your assets should be distributed after death. In other words, a Will is a document setting out your wishes or directions for family and friends as to how you want them to deal with your assets after your death.

A Will is a personal matter. It is up to you to decide if you want to discuss the contents of your Will with family members. We often recommend it as it may overcome difficulties later if people who benefit [beneficiaries] know your wishes in advance.

It would be best to inform anyone you appoint as Executor, Guardian or Trustee in your Will.

Guardians are the day-to-day carers of your children, Trustees are the financial managers, and Executors are the managers of your Will.

You may choose the same people to act as Guardians, Trustees and Executors.

TOP TIPS?

- First and foremost, make a Will – for the sake of an hour or so with your Solicitor – give yourself the peace of mind of knowing you have left instructions for your loved ones.
- If you know what you want, why delay – do it today.
- Once you have your Will made, review it after any significant life events and at least every five years.
- Remember that a Will should be reviewed regularly.
- A Will is just one element of future planning – you should also put an Enduring Power of Attorney or other decision-making mechanism and Advance Healthcare Directive in place.

- A Will, EPA and AHD are some Estate and Succession Planning elements.

WHY YOU SHOULD MAKE A WILL OR EPA?

Everyone should make a Will. There are many important reasons:

- You decide what is to happen to your property after your death. If you do not make a Will, the law dictates how your property is distributed.
- Many people like to make gifts of money or particular items for sentimental reasons. These can be included in your Will, whether big or small.
- You can choose who is to carry out your wishes by appointing what is called an Executor.
- It makes it easier for friends and family if you leave a Will.
- No one will ever know if you don't say what you want in a Will.

WHY IS IT SO IMPORTANT?

Many people underestimate the importance of making a Will or having an Enduring Power of Attorney.

Putting these in place can make things much easier for your loved ones.

Would you go away for a few months without leaving your keys with a neighbour or your children with a childminder?

Why would you not plan for your future care or not look after your family when you are no longer around to do it?

If you don't plan it, it won't happen. There is one certainty – we can't last forever!

SHOULD YOU DO ANYTHING ELSE WITH YOUR WILL?

As well as making a Will, you should also consider other legal mechanisms to plan for your future, such as :

- Enduring Power of Attorney – Living Wills – for future care
- Nursing Home Support Scheme review
- Advanced Care Directive – for future health decisions
- Co-Decision Making Agreement – to provide help with decisions.
- Estate or Succession Plan.

WHY SHOULD YOU USE A SOLICITOR TO DRAFT A WILL?

There is nothing to say that you must use a Solicitor to make a Will, but it is advisable. A poorly drafted Will can be worse than having no Will at all. Wills are subject to stringent rules for an excellent reason – to prevent fraud.

The law is stringent, for example: –

- A beneficiary should not witness a Will.
- Witnesses must witness you signing your Will.
- A gift should identify the person benefiting.

WHEN SHOULD A WILL BE MADE OR CHANGED?

- Becoming the owner of property/cash
- getting married
- going abroad
- getting divorced or separated
- buying a house
- having children
- inheriting property (or winning the Lottery!)
- retiring, getting older or suffering from illness

- **NOW!** They say there is no time like the present to do things.

WHAT IS A WILL, AND HOW DOES IT WORK?

- A Will is a legal document detailing how your possessions should be divided after death.
- The person making a Will is called a Testator.
- A Testator may change a Will at any time.
- Two people must sign and witness a Will; otherwise, it is invalid.
- It should be kept safely. You often leave the original Will with your solicitor for safekeeping.
- It is advisable to tell the Executor where the original Will is kept.
- A Will only takes effect after the death of the Testator.

CAN YOU SELL AN ASSET AFTER PUTTING IT IN A WILL?

The fact that you have made a Will does not prevent you from dealing with your property after the Will is made.

So, for example, you make a Will leaving all the money in a particular bank account to your daughter. Later, you decide you need that money and are concerned that it could not be spent because it had been left in the Will to your daughter.

This is not the case – you are entitled to do what you want with the money during your lifetime. The same applies to any other property, be it a car, a house or shares.

Therefore, carefully drafting a Will is essential to ensure your wishes are correctly communicated.

CAN A WILL BE CHALLENGED?

If you are married or have a Civil Partner, you cannot exclude them in your Will. They are entitled to what is called a 'legal right share'.

- A spouse/civil partner excluded from a Will is entitled to half the estate if there are no children and one-third if there are children. This share takes priority over all other terms in a Will.

There are several other situations where a Will can be challenged:

- Uncertainty in the contents of the Will.
- Lack of capacity of the Testator.
- Undue influence or Duress of the Testator.
- Lack of legal formality.
- Lack of proper provision for children.
- A failed promise by the Testator.
- Failing to provide for a cohabitant.

WHAT IS AN EXECUTOR?

Your Executor carries out your wishes as set out in your Will. Choosing the right person or persons is an important decision.

It should be somebody you trust and who is up to the job. Ideally, it should be the job given to two people to act as co-executors.

When you die, your assets are frozen, and a legal mechanism is required to allow your Executor to unfreeze these assets and manage the estate left behind.

The Executor needs to be able to identify assets, take control of them and pass them on to the people entitled under your Will.

WHAT ARE GUARDIANS?

If you have young children, you must appoint someone to look after them. This person is a guardian who is in loco parentis to your children.

The person appointed as guardian must be someone you would trust to look after the best interests of your children.

They should be aware that they have been appointed guardians under your Will.

WHAT ARE TRUSTEES?

Where children are underage, you need to have a way to look after the finances for those children before they come of age.

This is usually done by a mechanism called a Trust. It would be best if you chose someone you believe can manage money in the best interests of your children – called Trustees. In such a trust, the children usually take control of the finances when they reach an agreed age.

In another form of Trust, called a discretionary trust, Trustees will have absolute discretion as to how much, when and who is paid.

A discretionary trust may be a good way of providing for vulnerable children or children with disabilities.

WHAT HAPPENS IF YOU OWN PROPERTY WITH ANOTHER PERSON?

If two or more people own a property, there are two ways that the property can be treated.

The property automatically goes to the other owner in one case - a joint tenancy.

In the second case –tenancy in common – the property will go according to your Will.

A prevalent example is the family home a married couple shares, where one of them passes away, and the surviving spouse becomes the full owner.

You need to check that you have the appropriate form of ownership.

WHAT IS ESTATE AND SUCCESSION PLANNING?

Estate planning is planning the transfer of assets to the next generation.

While making a Will is undoubtedly the first step in planning, other issues must be considered.

In certain circumstances, it might be appropriate to make gifts to the next generation during your lifetime.

For instance, you may wish to transfer your business or farm to one of your children working in the business or on the farm. You may want to benefit your children as they start their adult lives to help set them up.

It is vital to remember to take measures and retain enough assets to maintain yourself for your lifetime, such as a nest egg for nursing home care or having a right of residence in the family home on the transfer of ownership.

WHAT TAXES DO YOU HAVE TO WORRY ABOUT?

Capital Acquisitions Tax [CAT]

CAT is payable by a person receiving any inheritance or lifetime gift.

Spouses and civil partners are not liable for CAT.

Planning is vital to avail of any exemptions or reliefs such as Primary Residence relief or putting an insurance or mortgage protection policy in place to assist with the tax implications.

Capital Gains Tax [CGT]

CGT is payable on lifetime gifts and on the asset's value increase from the date of asset acquisition by the donor to the date of disposal.

Stamp Duty

Stamp duty is payable on the transfer of property during your lifetime. It is not payable where property is transferred on the donor's death.

SPOUSES & CHILDREN –INHERITANCE RIGHTS

When a person dies intestate (without a Will), the law dictates how the deceased's estate is divided.

There are three possible scenarios:

1. Spouse and no children – spouse entitled to all of the estate

2. Spouse and children – spouse entitled to two-thirds, and children share the remainder

3. Children only – children share the entire estate.

WHAT ARE THE RIGHTS OF A SURVIVING SPOUSE IN A WILL?

The Succession Act provides that irrespective of the terms of a Will, a spouse is entitled to a specific share in an estate. This is known as the 'Legal Right Share'. This Legal Right Share aims to prevent the deceased from disinheriting the surviving Spouse.

The 'Legal Right Share' size depends on whether the deceased had children. Where there are children, the Legal Right Share of the spouse is a 1/3rd of the estate. The Legal Right Share is ½ of the estate where there are no children.

WHAT HAPPENS WHEN THE SURVIVING SPOUSE IS NOT IGNORED BUT PERHAPS GETS A TOKEN INHERITANCE?

The spouse has a right of election. This means that the spouse can choose between the Legal Right Share and the Bequest OR, if the Legal Right Share exceeds the bequest, the right to take the gift as partial satisfaction of the Legal Right Share.

CAN A SPOUSE LOOK TO GET A SPECIFIC ASSET TO MAKE UP THEIR LEGAL RIGHT SHARE?

The general rule is no. The spouse cannot pick and choose. An exception exists where the Spouse has the right to specifically require that the dwelling in which they reside is given to the spouse in satisfaction of their Legal Right Share.

Usually, the surviving spouse will have to pay the difference in value if there is one. However, there are circumstances where this rule is relaxed.

DO THE RIGHTS OF INHERITANCE AND THE LEGAL RIGHT TO SHARE SURVIVE MARITAL BREAKDOWN?

1. **Spouses living apart informally.**

When spouses are living apart informally, they continue to be spouses in the eyes of the law, and therefore, their rights under the Succession Act are not affected.

2. **Deed of Separation**

In a situation where a married couple has executed a Deed of Separation, very often, they will have renounced their entitlements under the Succession Act and in the event of the death of either of them, they will not be entitled to inherit.

3. **Judicial Separation**

Often, but not always, the Courts in judicial separations will grant an order extinguishing a spouse's rights under the Succession Act.

4. **Divorce**

When a divorce is obtained in Ireland, the marriage is dissolved, and, therefore, the Spouses lose their rights to their share on intestacy or their Legal Right Share.

DO CHILDREN HAVE SIMILAR ENTITLEMENTS?

NO WILL

In a situation where there is no Will, children have a right to a 1/3 share in the Estate if there is a surviving Spouse. If there is no surviving spouse, they are entitled to share the entire estate equally.

WILL

In a situation where there is a Will, children, in contrast to the rights of a spouse, do not have a right similar to the legal right share.

In contrast, they have a right to apply to the Court for provisions made for them out of the estate.

The Court will only do so if it finds that the deceased parent has failed in his moral duty to make proper provision for the child by his means.

The courts will look at all the surrounding circumstances, in particular:

- The age of the child
- Their position in life
- The age and position of the other children of the testator
- The means of the parent
- Whether and what provision the parent made for the child during his lifetime
- They may look at the conduct of the child towards their parent

Whether that child had a need, the parent could satisfy it according to their means.

There are strict time limits within which applications must be made by an aggrieved child, making it imperative to seek legal advice at the earliest opportunity.

WHAT IS THE IMPACT OF LIVING WITH SOMEONE?

With the Civil Partnership Act, qualifying cohabitants can apply to the Court for provision out of their deceased partner's estate.

ENDURING POWER OF ATTORNEY (EPA)

If we had a crystal ball and could see into the future, wouldn't it be wonderful – we could plan and manage our business and personal affairs accordingly.

Unfortunately, none of us can predict what is around the corner, so the importance of having the right person in the wings with the legal authority to act on your behalf, if you are not in a position to do so yourself, cannot be understated.

WHAT IS AN ENDURING POWER OF ATTORNEY?

If someone becomes incapacitated through disability, illness or a progressive degenerative disease, their assets become frozen. To avoid this situation, a person in good health should create an Enduring Power of Attorney (EPA). This legal document only takes effect if that person loses decision-making capacity.

The person creating the EPA is known as the Donor and, in the event of their incapacity, can give full or limited power to a nominated person (i.e. an Attorney) to manage all or some of their property and affairs and make decisions on their personal welfare.

The Attorney can deal with the donor's personal care, money, assets, or both by creating the EPA.

This only happens when the Donor needs help deciding on the matters in the EPA.

The EPA is registered with the Decision Support Service and then activated on notice to the DSS if they lack capacity.

It may be that the donor only needs help making decisions, in which case, the donor can put a decision-making agreement in place.

POWERS

An EPA can be very specific, e.g., giving the Attorney tasks like selling property or managing bank accounts only.

In addition to decisions on assets, the donor can give the Attorney power to make specific personal care decisions for the donor, e.g. where the Donor lives, whom they should see and not see, diet and dress and so on.

The donor can also give the Attorney general power under the EPA, entitling the Attorney to do everything the donor can do with their money and property.

For any nominated decision, the Attorney can legally do anything that the Donor could have done if they had had the capacity.

WHO CAN BE APPOINTED AS AN ATTORNEY?

You can appoint anyone you wish to act as your Attorney, e.g. spouse, family member or friend unless they are ineligible – e.g. under 18 or convicted of certain offences or owners of a nursing home. You can also select more than one person.

The choice of Attorney is personal, but a good deal of thought needs to be given to the nomination.

You need to ask yourself, is this person suitable for the job? Are they trustworthy and have the skills to manage my affairs and make decisions?

There is a statutory mechanism to oblige your Attorney to be answerable to both the Courts and the Decision Support Service when carrying out their duties under the EPA.

WHAT IS THE PROCEDURE FOR CREATING AN EPA?

The procedure for creating an EPA is now managed by a central authority – the Decision Support Service.

You must consider several vital matters, such as who you appoint as an attorney and what kind of authority you will give them. It would be best to consider whether a specific or general Power of Attorney suits your needs.

Amongst the paperwork that needs to be completed for the Power of Attorney to be valid are:

- A statement from your Solicitor that you understood the effect of creating the Power of Attorney.

- A statement from your doctor and health care professional confirming that you had the mental capacity to understand the effect of creating the Power of Attorney.

- A statement from you that you understood the effect of creating the power.

- A statement from the Attorney that they understand the implications of the responsibility that they will be taking on.

The process also requires you to notify certain people that you have made the Power of Attorney, usually including your spouse, adult children, attorney and decision-makers.

The EPA has to be registered on the Decision Support Service's website and approved by the Director of the Decision Support Service.

The Director must notify and approve the subsequent activation of the EPA.

The initial registration and the notification can be subject to objections by the notice parties.

WHAT HAPPENS IF I CHANGE MY MIND?

The EPA can be revoked anytime if you continue to have capacity.

If you change your mind about having an EPA or your choice of Attorney, you should consult your Solicitor immediately.

Your Solicitor will advise on the process of revocation of the EPA.

ACTIVATION OF THE EPA

The Attorney must apply to the Director of the Decision Support Service to activate the EPA if the Donor becomes mentally incapacitated.

The Director will require evidence of the Donor's incapacity. Notice of the application to register the EPA must be served on the Donor and the same persons notified of the creation of the EPA.

Once the Director accepts the notification of incapacity, the Attorney can lawfully act on the Donor's behalf.

An enduring power of attorney is a vital part of your forward planning.

The Enduring Power of Attorney will prevent a situation where financial assets become frozen as friends and family members struggle to cope with the stresses and demands of a Donor's illness.

DECISION-MAKING AGREEMENTS & ADVANCE HEALTH CARE DIRECTIVE

WHAT IS ASSISTED DECISION-MAKING?

Additional mechanisms are available to you to deal with present and future needs. They complement an Enduring Power of Attorney.

They are legally binding agreements that authorise people nominated by you to help you make decisions on your personal welfare or assets and affairs.

They provide for the individual's right to autonomy and self-determination to be respected when the decision-making becomes somewhat compromised.

It also includes an Advance Healthcare Directive that outlines your medical treatment options.

These are made when a person can make decisions but needs assistance or someone to decide with them.

These mechanisms place a legal requirement on service providers to comprehensively enable a person to decide on providing a range of supports and information appropriate to their condition.

Under the new regime, a Decision Support Service has clearly defined functions to oversee these agreements.

The Director of the Decision Support Service will have the power to vet these agreements and to investigate complaints about any action by decision-makers.

HOW DOES IT WORK?

- The law sets out a new basis for assessing a person's capacity to make decisions – a **functional** test.
- There are now statutory guidelines that must be followed to establish capacity.
- It is no longer the case that capacity is a once-off assessment. Your capacity is judged by the decision you have to make – for example; you may have the capacity to decide where you want to reside but not where to invest your money.
- Every effort has to be made to facilitate a person making a decision.
- This test will determine a person's ability to understand the nature and consequences of the decision in the context of the available choices.
- It sets out a positive and a negative test:

    1. A person lacks capacity if they can no longer understand the decision, retain information long enough to make a voluntary choice, or communicate their decision by any means, either directly or through a third party.
    2. A person is not regarded as unable to understand information if they require an explanation appropriate to their circumstances; can only retain information for a short period; lacks capacity for one decision but not for others; lacking capacity for a decision at one point does not preclude them from having the capacity later.

Information relevant to decision-making includes information about the reasonably foreseeable consequences of the choices of failing to make the decision.

ASSISTED DECISION-MAKING MECHANISMS AVAILABLE TO A PERSON?

- A Decision-Making Assistant
- A Co-Decision-Maker
- A Decision-making Representative
- An Attorney under an Enduring Power of Attorney

- A designated healthcare representative
- A Designated Healthcare Representative under an Advance Health Care Directive

ADVANCE HEALTHCARE DIRECTIVES

This means an advance expression of a person's desire and preference on treatment decisions that may arise if they subsequently lack capacity. Treatment means an intervention which may be made for a therapeutic, preventative, diagnostic, palliative or other purpose for the physical or mental health of the person. This includes life-sustaining treatment. The directive's objective is to enable people to be treated according to their wishes and preferences and to provide healthcare professionals with information about their treatment choices.

This includes an entitlement to refuse treatment, notwithstanding the refusal.

- It appears to be an unwise decision
- It seems not to be based on sound medical principle
- May result in the person's death

The net effect of the Advance Health Care Directive is to provide civil and criminal indemnity for healthcare professionals if they act by such Directive.

FAIR DEAL SCHEME

WHAT IS THE FAIR DEAL SCHEME?

The Fair Deal Scheme replaces the old subvention scheme, which provided financial assistance for people in long-term nursing home care.

The basic principle behind the scheme is that the patient contributes to the cost of care, and the State will pay the balance.

HOW DO I AVAIL OF THE SCHEME?

There are 3 steps in the Scheme. All applications are made through the local Nursing Home Support Office, and standard forms are available.

STEP 1 – CARE NEEDS

Assessment

- You apply for a Care Needs Assessment to identify whether you need long-term nursing home care.
- A healthcare professional, such as a nurse appointed by the HSE, performs the assessment.
- A report is prepared following this assessment and submitted to the HSE, and a decision will be made. Once a decision is made, you will be notified in writing within 10 working days, and a copy of the report and reasons for the decision will be given to you.

STEP 2 – FINANCIAL ASSESSMENT

- The second stage of the application is a Financial Assessment. At this stage, your contribution towards the cost of your care will be determined, as well as the level of financial assistance or State Support you will receive.
- The Financial Assessment examines your income and assets to determine your contribution. Income and assets include earnings, pension, social welfare, rental income, property (including property outside the State), stocks and shares. The Financial Assessment will also consider any income or assets you have disposed of in the 5 years leading up to the application.
- The assessment will not consider the income of other relatives, e.g. children.
- Having looked at income and assets, your contribution is worked out, and this is the equivalent of 80% of assessable income and 5% of the value of any assets. The first €36,000 of your assets is exempt.

- If your assets include land and property, the 5% contribution based on those assets can be deferred and collected from your estate – this is the Nursing Home Loan element of the Scheme.

- If you are still in long-term nursing home care after 3 years, your principal residence will no longer be considered in the Financial Assessment. The cap can be extended to farms and businesses in certain circumstances.

STEP 3 - NURSING HOME LOAN

This is an optional step and is the new element of the Scheme. It is essentially a loan from the State, and the formal name that the HSE has put on it is "Ancillary State Support".

- Where a person's assets include land and property, the 5% contribution based on those lands and property can be deferred, i.e. the State pays an amount equivalent to the 5% contribution and will collect the amount that they have paid out of a person's estate after their death.

- The primary purpose of this element of the Scheme is to ensure that people do not have to sell assets during their lifetime to meet the cost of nursing home care.

- To avail of the Nursing Home Loan, you must provide written consent to the HSE to register a "Charging Order" against your asset. This is like a mortgage.

- People needing long-term nursing care often have diminished mental capacity and cannot consent to the Charging order. In this situation, a Care Representative can be appointed.

- The Court appoints the Decision Making Representative to act for the person in the Nursing Home Scheme, particularly the Nursing Home Loan. Legislation details the people in order of priority who can apply to become a Decision Making Representative.

- Two medical reports are required for the application.

- The Nursing Home Loan is repayable on a person's death or if they sell or transfer the property. The Nursing Home Loan may be deferred if a spouse or partner has lived there for three years.

BEREAVEMENT & ADMINISTERING YOUR ESTATE

WHAT DOES ADMINISTRATION MEAN?

A Grant of Representation is the term used to describe the legal document that authorises a person to allow someone to look after the estate of a deceased person.

The person's estate usually involves all their liabilities and assets at death.

The two primary forms of representation, the Grant of Probate or Letters of Administration, are necessary because their assets are immediately frozen when a person dies.

To deal with the estate, it is necessary to apply to the High Court Probate Office for this document, which enables the person to deal with a deceased's assets.

GRANT OF REPRESENTATION

This legal process allows a person to deal with a deceased person's assets - property, money and all other possessions after death. A Grant of Representation is required to deal with a deceased person's assets.

There are three types of Grant of Representation. Depending on whether you make a Will and if it is valid.

1. Grant of Probate – required where a valid Will has been made.

2. Grant of Administration Intestate – required where the deceased never made a Will

3. Grant of Administration with Will Annexed – required where the deceased made a Will but where there is an issue with the Will.

In certain circumstances, a Grant of Representation may not be required, i.e. where the deceased did not own property and the value of their other assets does not exceed a certain amount.

THE PROCESS IN BRIEF:

1. Check if the deceased has made a Will

2. If so, the Will will state who the deceased wishes to act as Executor – an Executor is the person who deals with the person's assets where there is a Will.

   If the Executors named in the Will have passed away or do not wish to act, an Administrator will be appointed.

   A Grant of Administration with Will Annexed is taken out.

   There are strict rules as to who can be appointed as an administrator.

3. Establish the entire assets and liabilities of the deceased.

   In some cases where the property is owned jointly by the deceased and another person, it may be that it is no longer owned by the deceased.

   Such property may pass to the other joint owner under what is known as the principle of survivorship.

4. Apply to the Probate office for a Grant of Probate/ Grant of Administration.

   This application usually takes approximately 18 weeks from lodging the paperwork, but it can take longer.

5. Once a Grant is issued, the estate can then be dealt with. Funds can be withdrawn from bank accounts, and properties can be sold or transferred.

6. Costs will be paid. Debts and liabilities will be discharged, and the beneficiaries' inheritance will be distributed to them.

7. Estate Accounts must then be drafted, setting out the details of the administration of the deceased assets.

WHAT PROBLEMS CAN ARISE THAT PEOPLE SHOULD BE AWARE OF?

All the paperwork for the probate application must be completed in the exact format required by the Probate Office.

Only complete applications or applications that comply with the rules will be accepted. This will result in delay, extra cost and frustration.

The Executor will have to make a return of all assets and liabilities of the deceased to the Revenue by completing an Inland Revenue Affidavit.

This is a very complex and detailed document; even the slightest error will result in rejection.

The job continues once the paperwork is completed and the Grant issues.

The Administrator must then distribute the estate under the Will – or the law if there is no will.

Even what can appear as the most straightforward administration can have its pitfalls.

For example, Mr. Browne was an administrator for his brother, who passed away. He decided to administer the estate himself. There was no Will. He had two siblings, one of whom passed away before his brother.

He did not realise that the children of his pre-deceased sibling were entitled to share in their parent's share of the estate until after he had distributed the assets and the children had taken a claim.

Having spent extensive time dealing with the estate administration, he needed to deal with these issues, which only came to light when his deceased brother's family sought advice.

IS A SOLICITOR NECESSARY TO DEAL WITH THE APPLICATION FOR A GRANT OF PROBATE?

- It is helpful but optional to seek the advice of a Solicitor to guide you through the process.
- This will give you peace of mind that the application is being handled in a manner that all legal and tax issues will be addressed.
- If you go ahead and take out representation, you will have sole liability for the administration of the estate, together with the completion of all the necessary legal documents.
- A solicitor assists you in discharging your legal responsibilities associated with administrating the estate.

ARE CIRCUMSTANCES WHERE AN EXECUTOR CANNOT TAKE OUT A GRANT WITHOUT A SOLICITOR?

- The person entitled to apply for a Grant of Representation is a Ward of the Court or someone of unsound mind.
- Where the person entitled to apply is a minor (a person under the age of 18 years).
- Where there are issues concerning the validity of a will.
- Where there are issues among the next of kin regarding the estate.
- Where the original will has been lost.
- Where a beneficiary of more than €20,000 of an estate is non-resident in this jurisdiction, and the potential applicant for the Grant is also non-resident.
- Where the deceased dies without making a will (intestate) and was domiciled outside of the Republic of Ireland and leaving assets within this jurisdiction and no Grant of Representation has been extracted in the place of domicile (domicile is a legal term and used to describe the place in which the deceased had their permanent home.
- Where the deceased dies domiciled outside of the Republic of Ireland, leaving a will in a foreign language.

- The deceased dies domiciled outside of the Republic of Ireland, leaving a will that has not been proved in the law of domicile, and a person other than the executor intends to apply for a Grant within this jurisdiction.

IS IT ALWAYS NECESSARY TO TAKE OUT PROBATE/ADMINISTRATION?

No,

If the assets are insignificant, a bank may release funds without producing the Grant. For example, if the estate comprises €7,000, a bank would not simply insist on producing a Grant to deal with this and would release it to the next of kin if they provided an Indemnity.

Banks differ on the amount they will release without a Grant.

People can also nominate a person entitled to take over their account.

This usually happens with credit union accounts, post office accounts or assurance policies.

WHAT HAPPENS IN THE CASE OF PROPERTY THAT IS JOINTLY OWNED?

If a Testator owns property jointly with one or more people, the Solicitor must establish if the Testator owned that property as joint tenants or tenants in common.

Suppose it is the former, i.e. a joint tenancy; the will of the Testator will have no bearing on what happens to the property. In that case, ownership will automatically pass to the surviving owner.

A prevalent example of this is the family home – in most cases nowadays, when couples buy the family home, it is in joint names, and if that is the case, ownership will pass to the survivor on the death of the husband or wife.

If, on the other hand, the Testator and one or more other people owned that property as tenants in common, the Testators share will pass to whatever beneficiaries are named in the will unless the Testator and his co-owners have what we call a co–ownership agreement which is an agreement which regulates what happens when one of the owners dies – there is usually a buyout clause for the other owners.

WHO IS RESPONSIBLE FOR TAKING OUT THIS GRANT?

If a person dies leaving a Will, the Executor is responsible.

If there is no Will, the law determines who is entitled to take out the Grant.

The legislation governing this area is the Succession Act of 1965, which sets out the priority in which people can extract a Grant.

To give examples:

1. If a person dies and is survived by his wife and children, the person entitled to take out the grant is the surviving spouse.

2. If, on the other hand, there is no surviving spouse, children are next entitled to apply for the Grant.

3. Another quick example is a case of an unmarried person dying survived by his parents and brothers and sisters.

   In that case, either of his parents can apply for the Grant.

STEPS THAT MUST BE TAKEN TO APPLY FOR THE GRANT OF PROBATE/ADMINISTRATION?

In most cases, you will find that the Solicitor who acted for the Deceased person holds the Will, and the Executors will know it.

It is advisable for anyone who makes a Will to let either the Executor or a family member know where the original will is kept.

You will generally find that the Executor will contact the Solicitor to inform them that the person has passed away.

The Solicitor will arrange for the Executors to call their office, at which stage the Will will be read.

SHOULD THE EXECUTORS BRING ANYTHING WITH THEM TO THIS MEETING?

The Executors should bring a copy of the Death Certificate with them.

Bringing all paperwork for bank accounts, assets, insurance policies, pensions, etc., is always helpful.

WHAT WILL HAPPEN AFTER THAT MEETING?

Essentially, the Executors and the Solicitors will be on a fact-finding mission.

To apply for the Grant of Probate/Administration, the Executor and the Solicitor first need to supply a list of assets and liabilities of the Testator to the Revenue Commissioners.

This is done by completing a Statement of Affairs (Probate) Form SA2 online through myAccount or Revenue Online Service ROS.

So once the Will has been read, the Solicitor and the Executor must establish what assets the Testator owned, their value and any debts the Testator owes to complete the Inland Revenue Affidavit.

This Affidavit also requires details of the beneficiaries. Hence, it is usually the point where you would write to the beneficiaries to inform them of their entitlements under the will and obtain the information from them required by the Revenue Commissioners to process the Inland Revenue Affidavit.

HOW LONG DOES THIS PROCESS TAKE?

It largely depends on the size of the estate. If the Testator owned many properties and perhaps owned property abroad and had multiple bank accounts and life insurance policies, gathering all this information could take some time.

The Executor's job can be made more accessible if a person making a will thinks to leave a summary of their assets with the will – this will enable the Executor and the Solicitor to start the process quicker by knowing where and what to look for.

In some cases, the Executor and Solicitor will have no idea what assets the Testator owns, and they have to trawl through "the shoe box" at home to get clues as to where to start looking.

Once the Executor and Solicitor are satisfied that they have located all of the assets and the Inland Revenue is complete, it is sent to the Revenue

Commissioners, and after processing the form, they will issue what is known as the Certificate for the High Court. If you like, this is the go-ahead to apply to the Probate Office.

ARE THERE ANY PRACTICAL TASKS FOR THE EXECUTOR?

The Executor also must protect the assets of the deceased.

The Executor must ensure that any property belonging to the Testator is secure.

In the case of a house, for example, the Executor should make sure that valuables are removed and that the home is adequately insured.

The Executor should make sure any property is insured.

WHAT HAPPENS THEN?

The Solicitor will prepare the Application for the Probate Office. The Executor will have further papers to complete with their Solicitor, including what is known as the Oath of Executor.

The Executor must sign the Oath, and in that document, they confirm to the High Court – which is the office responsible for Probate/Administration matters – that they will administer the estate under the will of the Testator.

The Executor is making a substantial commitment in this document, and the significance should be considered.

Once the application is submitted, the Probate Office will consider the papers, and if everything is in order, the Grant of Probate/Administration will be issued.

WHAT CAN THE EXECUTOR DO ONCE THE GRANT IS ISSUED?

Once the Grant of Probate/Administration is issued, the Executor is entitled to gather all of the Testator's property and distribute it per the directions in the Will. So, for example, money in the Testator's bank account can be withdrawn, shares can be sold, and title to property (e.g.

houses) can be transferred to the beneficiaries or sold depending on the instructions in the will.

WHERE SOMEONE DIES WITHOUT A WILL, ARE THE STEPS MORE OR LESS SIMILAR?

They are more or less the same.

When someone dies intestate, there is a further requirement to get a Bond–like an insurance policy- once the Inland Revenue Affidavit has been certified by the Revenue Commissioners.

Apart from that, the process is the same.

AFTERTHOUGHT

Not surprisingly, planning is the key to success as in all things.

The Hospice Foundation mantra: **Think**: **Talk**: **Tell** is very powerful.

"Always plan ahead. It wasn't raining when Noah built the ark." – Richard Cushing.

"Better three hours too soon than a minute too late." – William Shakespeare.

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