MAKING A WILL

WHAT IS A WILL?

A Will is a legal document detailing how someone's possessions should be divided after their death. In other words, a Will is a letter of wishes or directions for family and friends as to how to divide property after a person's death.

A Will is a personal matter for every individual to decide for themselves to whom they should leave their property. There is no obligation for anyone to disclose the fact that they have made a Will or indeed the contents of their Will. It is up to every individual to decide whether or not they want to discuss the contents of the Will with family members. It is, however, advisable to inform the executor of the whereabouts of the Will.

CAN A WILL BE CHANGED?

A Will can be changed or revoked at any time. A Will can be changed and updated as often as you choose. It is recommended that a person regularly review their Will.

CAN I SELL OR DISPOSE OF MY PROPERTY AFTER I HAVE MADE MY WILL?

A Will only takes effect on death. The fact that a person has made a Will does not prevent them from dealing with property after the Will is made, for example houses can still be sold and money in the bank can be spent.

WHY SHOULD SOMEONE MAKE A WILL?

Almost everyone should make a Will. There are many important reasons to make a will.

- You decide what is to happen to your property after your death. If you do not make a Will, the law dictates that your property is distributed amongst your closest relatives.

- Many people like to make gifts of money or of particular items such as furniture, clothing, or personal belongings to friends or relatives. These can be included in your Will, no matter how big or small.

- You can choose who is to carry out your wishes by appointing EXECUTORS. The executor is the person appointed to carry out the wishes of the person making the Will. The law says that you only need to name one executor but it is advisable to appoint two executors.

- It makes it easier for friends and family if their loved one leaves a Will.

WHAT HAPPENS IF SOMEONE DIES WITHOUT A WILL OR IF A WILL IS DEEMED INVALID?

- A person who dies without a Will is said to have died 'intestate'.

- If someone dies intestate, it means the person's estate, or everything that they own, is distributed in accordance with the law by an administrator.

- In these cases, debts and expenses are firstly deducted then the estate is distributed amongst the nearest next of kin.

- The following section details entitlements when a person dies intestate:
  A spouse but no children: your spouse gets the entire estate.
  A spouse and children: your Spouse gets two-thirds of your

estate and the remaining one-third is divided equally among your children. If one of your children has died, that share goes to his/her children.

Children, but no spouse: your estate is divided equally among your children (or their children).

Parents, but no spouse or children: your estate is divided equally between your parents or given entirely to one parent if only one survives.

Brothers and sisters only: your estate is shared equally among them, with the children of a deceased brother or sister taking his/her share.

Nieces and nephews only: your estate is divided equally among those surviving.

Other relatives only: your estate is divided equally between the nearest equal relationship.

- In the absence of a Will and of any relatives the estate goes to the state – but this is a very rare occurrence.

CAN A WILL BE CHALLENGED?

If the person making a will is married and excludes their spouse from the will the spouse is entitled to a 'legal right share', which means that a spouse cannot be dis-inherited.

A spouse who has been excluded from a Will is entitled to half the estate if there are no children. If there are children a spouse who has been excluded from a Will is entitled to one-third of the estate. This share takes priority over all other provisions.

Children, while not having an automatic entitlement can make a successful claim against your estate if they can prove that they were not properly provided for by you as their parent. Children include all children and their issue – including step children, adopted children or children in whom you have taken on the role of parent know as in loco parentis.

There are a number of other situations where wills can be challenged.

WHEN SHOULD A WILL BE MADE?

It is appropriate, very often, on reaching certain stages in life:

- 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 illness
- **NOW!** As they say there is no time like the present to do things!

THE ASSISTED DECISION-MAKING (CAPACITY) ACT 2015 – WHAT IS IT?

This Act was passed by the Oireachtas on Thursday 17 December 2015. The Act applies to everyone and has relevance for all health and social care services.

KEY FEATURES OF THE ACT

- It applies to everyone and to all health and social care settings

- It provides for the individual's right of autonomy and self-determination to be respected through an Enduring Power of Attorney and an Advance Healthcare Directive.

- Both of these are made when a person has the capacity to make decisions. They come into effect when a person may lack decision-making capacity.

- It provides for legally recognised decision makers to support a person in maximising their decision making powers.

- It places a legal requirement on service providers to comprehensively enable a person to make a decision through the provision of a range of supports and information appropriate to their condition.

- It abolishes the Wards of Court system

- It provides for a review of all existing Wards to either discharge them fully or to transition those who still need assistance into the new structure.

- It establishes a Decision Support Service with clearly defined functions. This will include the promotion of public awareness relating to the exercise of capacity by persons who may require assistance in exercising (carrying out?) their capacity

- The Director of the Decision Support Service will have the power to investigate complaints about any action by a decision-maker in connection to their functions as such decision-maker.

HOW THE ACT WILL WORK

- It establishes a new basis for assessing a person's capacity to make decisions – a functional test.

- This test will determine a person's ability to understand **at the time of a decision** the nature and the consequences of the decision in the context of the available choices at the time.

- It sets out a positive and a negative test:

  1. A person lacks capacity if they are no longer able to understand the decision, are unable to retain information long enough to

make a voluntary choice or are unable to 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.

The Act defines information relevant to decision making as including information about the reasonable foreseeable consequences of the choices of failing to make the decision.

ADVANCED HEALTHCARE DIRECTIVES

This means an advance expression of a person's desire and preference concerning treatment decisions that may arrive if they subsequently lack capacity.

Treatment means an intervention which may be made for a therapeutic, preventative, diagnostic, palliative or other purpose related to the physical or mental health of the person. This includes life-sustaining treatment.

The objective of the directive is to enable people to be treated according to their wishes and preferences and to provide healthcare professionals with information about persons on their treatment choices.

This includes an entitlement to refuse treatment notwithstanding that the refusal

- Appears to be an unwise decision
- Appears not be based on sound medical principle OR
- 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 in accordance with such Directive.

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

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 makes a contribution towards 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 there are standard forms available.

Step 1 - Care Needs Assessment

- You apply for a Care Needs Assessment, which will identify whether or not you need long term nursing home care.
- The assessment is carried out by a healthcare professional such as a nurse appointed by the HSE.

- 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 that you will receive.

- The Financial Assessment looks at all your income and assets to determine what your contribution will be. Income and assets include earnings, pension, social welfare, rental income, property (including property outside the State), stocks and shares. The Financial Assessment will also take into account any income or assets that you have disposed of in the 5 years leading up to the application.

- The assessment will not take into account 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 taken into account 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 have 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.

- In order 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.

- It is often the case that people who need long term nursing care have diminished mental capacity so they could not consent to the Charging order. In this situation a Care Representative can be appointed.

- The Care Representative is appointed by the Court so they can act for the person in respect of the Nursing Home Scheme and,

particularly, the Nursing Home Loan. Legislation details the people in order of priority who can apply to become a Care Representative.

- Two medical reports are required for the purposes of the application.

- The Nursing Home Loan is repayable on a person's death or if they sell or transfer the property. It is possible that the Nursing Home Loan may be deferred if a spouse or partner resides there and has lived there within the past three years.

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ENDURING POWER OF ATTORNEY

INTRODUCTION

If we had a crystal ball and could see into to the future wouldn't it be wonderful – we could plan and manage our businesses and personal affairs accordingly. Unfortunately none of us can predict what is around the corner and 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 not 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, while in good health, should create an Enduring Power of Attorney (EPA). This a legal document which only takes effect in the event that that person becomes mentally incapacitated.

The person creating the EPA is known as the Donor and in the event of his/her incapacity, can give full or limited power to manage all or a some of a Donor's property and affairs (including personal welfare).

The Donor is not prevented from dealing with his/her money and assets by creating the EPA, this only happens **if** the Donor lacks capacity to make decision on the matters set out in the EPA and the EPA is registered with the Decision Support Service.

POWERS

An EPA can be very specific, e.g. give the Attorney a particular task to carry out like the sale of property or management of bank accounts. The other type of EPA would be very general and virtually entitle the Attorney to do everything that you would do yourself, with your money and property. Importantly, this second type of EPA will also enable your

Attorney to make "personal care" decisions e.g. where the Donor lives, whom he/she should see and not see, diet and dress and so on.

WHO CAN BE APPOINTED AS ATTORNEY?

You can appoint anyone you wish to act as your Attorney e.g. spouse, family member or a friend. You can also appoint more than one person. The choice of Attorney is a personal matter 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 do they have the skills to manage my affairs and make decisions for me? 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 the creation of an EPA can be complex. You will have to consult your Solicitor and satisfy your Doctor and a Healthcare Professional that you have capacity to create the EPA. Your Solicitor will prepare the documents for you after consultation with you and deciding whether a specific or general Power of Attorney is more suited to your needs.

Amongst the paperwork that needs to be completed in order 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 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 your Solicitor to notify the two people that you have made the Power of Attorney.

WHAT HAPPENS IF I CHANGE MY MIND?

The EPA can be revoked at any time before it is registered. If you change your mind about having an EPA or about your choice of Attorney you should consult your Solicitor immediately. Your Solicitor will advise on the process of revocation of the EPA.

REGISTRATION OF THE EPA

The Attorney must apply to the Director of the Decision Support Service for registration of the EPA if the Donor becomes mentally incapacitated. The Director will require him/her to produce evidence of the Donor's incapacity and notice of the application to register the EPA must also be served on the Donor and the same two persons that were notified of the creation of the EPA.

Once the EPA is registered the Attorney can lawfully act on the Donor's behalf. An enduring power of attorney is an important as your Will, but many people place more emphasis on the latter. The Enduring Power of Attorney will prevent a situation arising where financial assets become frozen as friends and family members struggle to cope with the stresses and demands that the Donor's illness will foist upon them.

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ADMINISTRATION OF ESTATES

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 the date of death.

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

DOES REPRESENTATION ALWAYS HAVE TO BE TAKEN OUT?

- No. If assets in the estate are not significant, a bank or other Financial Institution may release funds without having to produce a Grant of Administration provided you guarantee them that if someone makes a claim on the funds that they are not liable.

- Financial Institutions differ on the amount they will release without a Grant

- A person can also nominate another person who will be entitled to receive the monies on their passing. This usually applies to credit union accounts, post office accounts or assurance policies.

- If property is held jointly as joint tenants, a Grant of Administration will not be required. The Will of the Testator will have no effect; ownership will automatically pass to the surviving owner.

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

- It is helpful but not necessary 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/or 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 completion of all the necessary legal documents.

- A solicitor offers you assistance in discharging your legal responsibilities associated with administrating the estate.

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.

- Incomplete applications or applications which do not fully comply with the rules will be rejected. This will result in delay, extra cost and frustration.

- A return of all assets and liabilities of the deceased has to be made to Revenue by completing an Inland Revenue Affidavit. This is a complex and detailed document, which has serious implications for the person responsible.

- Once the paperwork in correctly completed and the Grant issues, that is not the end of the matter. The person responsible must then

distribute the estate in accordance with the Will and/or the legal principles for the administration of an estate.

- Even what can appear a straightforward administration can have its pitfalls. For example, Mr Browne was Executor for his late brother and decided to administer the estate himself. There was no Will. He had two siblings one of whom pre-deceased his brother.

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

WHEN MUST YOU INSTRUCT A SOLICITOR?

- If the person entitled is a minor, a ward of court or of unsound mind, the Probate Office will insist that the application is made with a Solicitor.

- Where there is a question over the validity of the Will or the Will has been lost.

- In some circumstances, individuals will not be permitted to take out a Grant where the beneficiaries or the deceased person were resident outside Ireland.

- The Probate Office can refuse to permit an individual to take out the Grant.

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SPOUSES AND CHILDREN KNOW YOUR INHERITANCE RIGHTS

LEGAL TERMS

Testacy = Legal term used when person dies having made a valid Will.

Intestacy = Legal term used where a person dies without making a valid Will.

WHAT ARE SPOUSE'S AND CHILDREN'S INHERITANCE RIGHTS ON INTESTACY?

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 2/3rd's and children share the remainder
3. Children only – children share in entire estate

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

The surviving Spouse has very definite and automatic rights. The Succession Act provides that no matter what the Will provides, a spouse is entitled to a specific share in an estate. This is known as the 'Legal Right Share'. The purpose of this Legal Right Share is to prevent the deceased from reducing the surviving Spouse below this minimum.

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

WHAT HAPPENS IN A SITUATION WHERE 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 HIS/HER LEGAL RIGHT SHARE?

The general rule is no, the spouse cannot pick and choose. An exception exists where the Spouse has the right to elect to take the dwelling in which he/she resides in satisfaction of this Legal Right Share.

Usually, the surviving Spouse will have to pay any difference in value between their share and the value of the house...

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

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.

Deed of Separation

In a situation where a married couple have 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.

Judicial Separation

Often, but not always, the Courts in judicial separations will make an order extinguishing spousal rights under the Succession Act.

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.

This is extinguishment is, however , subject to a right of a former spouse to make a claim on a deceased former spouse's estate in certain circumstances unless this right is waived.

DO CHILDREN HAVE SIMILAR ENTITLEMENTS?

Intestacy

On intestacy 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.

Testacy

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

In contrast children have a right to apply to the Court to have provision 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 in accordance with 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/her lifetime
- They may look at the conduct of the child towards their parent
- Whether that child had a need which the parent was able to satisfy in accordance with his/her 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 THE CIVIL PARTNERSHIP ACT?

With the new Civil Partnership Act, qualifying cohabitants can make an application to the Court for provision out of the estate of their deceased partner.

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TRANSFER OF ASSETS TO SPOUSES AND CHILDREN

WHAT DO I NEED TO CONSIDER IF TRANSFERRING PROPERTY?

- Property already owned with your spouse on a tenants-in-common legal basis should be changed to a joint-tenants basis.
- If there is a mortgage on the property you wish to transfer, the financial institution must consent to the transfer of the property into joint names.
- Assets can only be transferred when you are solvent.
- If a person who has transferred property is declared bankrupt, the courts can seek to reverse any transfers made in the previous 5 years.
- Transferring property to a spouse is the most tax effective way of transferring assets.

WHAT IS THE DIFFERENCE BETWEEN A TENANCY-IN-COMMON AND A JOINT-TENANCY?

Tenants-in-common

- Each person owns a specified portion of the property. The portions can be equal or one person can own a greater portion than the other.
- In a tenancy in common scenario the shares of the co-owners will not pass to the survivor when one of the owners dies. The Will of the deceased owner or law of intestacy determines who takes his/her interest.

- If no Will exists, usual laws of intestacy apply. This situation could an unintentional situation whereby multiple people own shares in a property.

Joint -Tenants

- Both parties own the whole property. If one person dies the property automatically passes to the survivor. This is the most common form of property ownership for married couples, cohabiting couples and sometimes close family members.

Transfer of the Family Home into Joint Names

- Transferring your family home into joint names ensures that the property automatically passes to the surviving spouse/cohabitant.

- There are a number of advantages to putting the family home into joint names.

- Transfers between spouses are exempt from stamp duty, capital gains tax and gift tax – irrespective of whether the property is a family home or a business property.

A transfer of assets to a child or children during your lifetime can give opportunities for tax planning and in certain situations tax exemptions.

Business Assets (shares)

Traditionally, if a parent qualifies for "retirement relief" there is a Capital Gains Tax exemption on the transfer of assets to children.

Certain conditions must be met including:

- The parent (shareholder) must be 55 years or older when transferring the assets.

- The assets must be owned for 10 years or more.

- S/he must have been a working director for 5 years before the transfer.

If the value of the assets being transferred is less than €332,084 Capital Acquisitions Tax (CAT) will not apply. This threshold was reduced from €414,799 in 2010.

Transfer of Family Farm

Transferring your family farm to your child (or favourite nephew/niece) is exempt from Capital Gains Tax (CGT) provided:

- The farmer is over 55 years of age at the time of the transfer.

- Qualifying assets include agricultural assets owned and used by the farmer for a minimum of 10 years.

- Land must be transferred to the same person.

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