LEGAL ADVICE

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INTRODUCTION

Power of attorney is a legal device in Ireland that can be set up by a person (the donor) during his/her life when he/she is in good mental health. It allows another specially appointed person (the attorney) to take actions on the donor's behalf if he/she is absent, abroad or incapacitated through illness. The relevant legislation is the Powers of Attorney Act 1996 and the Enduring Powers of Attorney Regulations 1996 (SI No. 196/1996) as amended by SI No. 287/1996.

Part 7 of the Assisted Decision-Making (Capacity) Act 2015 provides for new arrangements for those who wish to make an Enduring Power of Attorney. When the 2015 Act is commenced, no new Enduring Power of Attorneys will be created under the 1996 Act.

If someone in Ireland is mentally incapacitated (for example, because of illness, disability or a progressive degenerative illness), all of their assets and property are normally frozen and cannot be used by anyone else unless they are jointly owned or, someone has power of attorney to deal with their property or money.

In a larger sense, power of attorney is just one of the legal arrangements that you can make during your lifetime, in the event you become incapacitated or unable to deal with your affairs. Information to help guide you in recording and registering your preferences in the event of emergency, serious illness or death is available at Thinkahead.ie, where you can also download the Think Ahead Form. Read more about the legal arrangements in the event of incapacity here.
Types of power of attorney

There are two types of power of attorney allowed under Irish law:

- Power of attorney which gives either a specific or a general power and ceases as soon as the donor becomes incapacitated
- Enduring power of attorney which takes effect on the incapacity of the donor

Both cease on the death of the donor. However, it may be difficult to prove that the donor is dead if his/her body cannot be found, for example, as in the case of a death by drowning. Once the body is found or the donor is declared to be “believed dead” by a court (usually after 7 years have passed), the power of attorney (if there was one) ends and their affairs are dealt with in the normal way by will or under intestacy law.

POWER OF ATTORNEY

A power of attorney can be specific (limited to a particular purpose, for example, sale of your house in your absence) or general (entitling the attorney to do almost everything that you yourself could do). For example, it may allow the attorney to take a wide range of actions on the donor's behalf in relation to property, business, and financial affairs. He/she may make payments from the specified accounts, make appropriate provision for any specified person's needs, and make appropriate gifts to the donor's relations or friends.

You do not require a solicitor to create a general power of attorney. It can be created when signed either by you or at your direction and in the presence of a witness. However, it is advisable to get legal advice before you sign a form appointing someone else to manage your affairs. You can appoint anyone you wish to be your attorney.

A form of general power of attorney is given in the Third Schedule of the Powers of Attorney Act 1996.

ENDURING POWER OF ATTORNEY

An enduring power of attorney (EPA) also allows the attorney to make “personal care decisions” on the donor's behalf once he/she is no longer fully mentally capable of making decisions themselves. Personal care decisions may include deciding where and with whom the donor will live, who he/she should see or not see and what training or rehabilitation he/she should get. However, if the donor wants, he/she can specifically exclude any of these powers when setting up the power of attorney or can make the attorney's powers subject to any reasonable conditions and restrictions.

You can appoint anyone you wish to be your attorney, including a spouse, civil partner, family member, friend, colleague, etc. The procedure for creating an enduring power of attorney is much more complex than that for creating a general power of attorney.

Creating an enduring power of attorney

Because the enduring power of attorney involves the transfer of considerable powers from you to another person, there are a number of legal safeguards to protect you from abuses. The procedure for executing the enduring power of attorney is complex and requires the involvement of a solicitor and a doctor. The enduring power can only come into effect when certain procedures have been gone through and the courts have a general supervisory role in the implementation of the power.
The document creating the power must be in a particular format and must include the following:

- A statement by a doctor verifying that in his/her opinion you had the mental capacity at the time that the document was executed to understand the effect of creating the power
- A statement from you that you understood the effect of creating the power
- A statement from a solicitor that he/she is satisfied that you understood the effect of creating the power of attorney
- A statement from a solicitor that you were not acting under undue influence

At least 2 people must be notified of the making of an EPA, none of whom will be the attorney. One of the notice parties must be your spouse or civil partner if living with you. If this does not apply, one of your notice parties must be your child. If neither is applicable, one of the notice parties must be any relative (that is parent, sibling, grandchild, widow/widower/surviving civil partner of child, nephew or niece).

Who cannot be appointed?

An enduring power of attorney may be granted to individuals or trust corporations but may not be granted to the following people:

- People under the age of 18
- Bankrupts
- People convicted of offences involving fraud or dishonesty
- People disqualified under the Companies Acts
- An individual or trust corporation who owns a nursing home in which you live or an employee or agent of the owner, unless that person is also your spouse, civil partner, child or sibling

Registration

The EPA can only come into force when it has been registered. However, once an application to register the EPA has been made, the attorney may take action under the EPA's powers to maintain you and prevent loss to your estate. The attorney may also take action to maintain themselves and other persons, in so far as it is permitted under Section 6 (4) of the 1996 Act. The attorney may also make any personal care decisions permitted under the powers that cannot reasonably be deferred until the application for registration has been determined.
Also, in certain circumstances before the EPA is registered, application may be made to the court to exercise the EPA's powers under Section 12 of the Act.

In order to register an EPA, the future attorney makes an application for registration to the Registrar of Wards of Court, once there is reason to believe that you are or are becoming mentally incapable. The attorney must have a medical certificate confirming that you are incapable of managing your affairs.

Five weeks before making this application, the attorney must notify you and the notice parties of his/her intention to do so. Within the 5 weeks, the donor or a notice party can lodge a notice of objection on one of the grounds given in Section 10 (3) of the Act with the Registrar of Wards of Court.

The EPA may give general authority to the attorney to do anything that the attorney might lawfully do or it may merely give authority to do specific acts on your behalf.

The attorney may make certain personal care decisions - these must be made in your best interests, must be in accordance with what you would have been likely to do and the attorney must consult family members and carers in making these decisions. The attorney is considered to be acting in your best interests if he/she reasonably believes that what he/she decides is in your best interests.

A personal care decision is a decision concerning one or more of the following:

- Where and with whom you should live
- Whom you should see and not see
- What training and rehabilitation you should get
- Your diet and dress
- Inspection of your personal papers
- Housing, social welfare and other benefits

The list does not include health care decisions, although the borderline between personal care and health care decisions is not always clear. However, it seems clear that the attorney does not have the power to make a decision as to whether or not a person suffering from dementia should undergo surgery.
**Revocation of an enduring power of attorney**

The donor can revoke an EPA at any time before an application is made to register it. Once the EPA has been registered you cannot revoke it even if you are, for the time being, mentally capable. To revoke it, you would have to apply to the court and the court approve the revocation.

**Termination of an enduring power of attorney**

An EPA ceases on the death of the donor. However, there are other circumstances in which an EPA ceases to have effect.

For example, where a spouse or civil partner is the attorney, the EPA ceases where:

- The marriage/civil partnership no longer exists due to annulment, divorce or dissolution
- A judicial separation is granted or the couple enter into a separation agreement
- A protection, barring or similar order is made on the application of either spouse/civil partner

An EPA ceases where the attorney becomes one of the people listed above who cannot be granted enduring powers of attorney. The court can make an order cancelling an EPA where, for example, it finds the attorney is unsuitable.

**REGISTER OF ENDURING POWERS OF ATTORNEY**

The Office of Wards of Court maintains a register of EPA instruments which have been registered in the office. The register can be viewed by the public for free. A fee of €15 is payable if you wish to take a copy of an entry in the register.

**WHERE TO APPLY**

Office of Wards of Court
3rd Floor
15/24 Phoenix Street North
Smithfield
Dublin 7
Ireland
Tel: +353 (0)1 888 6189
Homepage: www.courts.ie
MAKING A WILL

INTRODUCTION

A will is a witnessed document that sets out in writing the deceased’s wishes for his or her possessions, (called his or her ‘estate’), after death.

Reasons for making a will

It is important for you to make a will because if you do not, and die without a will, the law on intestacy decides what happens to your property. A will can ensure that proper arrangements are made for your dependants and that your property is distributed in the way you wish after you die, subject to certain rights of spouses/civil partners and children.

It is also advisable to complete and keep updated a list of your assets. It will make it easier to identify and trace your assets after you die. You should keep the list in a safe place.

What happens if you die having made a will

If you have made a will, you are called a testator (male) or testatrix (female). A person who dies having made a valid will is said to have died ‘testate’. If you die testate, then all your possessions will be distributed in the way you set out in your will. It is the job of the executor or executors you named in your will to make sure this happens. There are legal limits as to how much of your property goes to which person, as set out in law in the Succession Act, 1965. An executor can be a beneficiary under the will. In other words, the executor can also inherit under the will.

After you die, somebody has to deal with your estate, by gathering together all your money and possessions, paying any debts you owe and then distributing what is left to the people who are entitled to it. If you leave a will before you die, one or more of the executors you named in your will usually have to get legal permission from the Probate Office or the District Probate Registry for the area in which you lived at the time of death to do this. Permission comes in the form of a document called a Grant of Representation.

If you did not name any executors in your will or if the executors are unable or unwilling to apply for a Grant of Representation, documents called Letters of Administration (With Will) are issued. When your estate is distributed, the legal rights of your spouse/civil partner and children, if any, will be fulfilled first after any debts are paid before any other gifts are considered.
What happens if you die without a will or your will is invalid

A person who dies without a will is said to have died ‘intestate’. If you die intestate, this means your estate, or everything that you own, is distributed in accordance with the law by an administrator. To do this, the administrator needs permission in the form of a Grant of Representation. When a person dies without a will or when their will is invalid, this Grant is issued as Letters of Administration by the Probate Office or the District Probate Registry for the area in which the person lived at the time of death.

Rules

Distribution of your estate when you die intestate or have not made a valid will.

The legal rules governing the distribution of your property apply:

- When you have not made a will
- When the will has been denied probate because it has not been made properly or a challenge to it has been successful
- When the will does not completely deal with all your possessions.

In these cases, after debts and expenses have been deducted, the estate is distributed in the following way.

If you are survived by:

- A spouse/civil partner but no children (or grandchildren): your spouse/civil partner gets the entire estate.
- A spouse/civil partner and children: your spouse/civil partner 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/civil partner: your estate is divided equally among your children (or their children).
- Parents, but no spouse/civil partner 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.
- No relatives: your estate goes to the state.
The requirements of a valid will

It is possible to draw up a will yourself or you can hire a solicitor to help you. For a will to be legally valid, the following rules apply:

- The will must be in writing
- You must be over 18 (if you are or have been married you can be under 18)
- You must be of sound mind
- You must sign or mark the will or acknowledge the signature or mark in the presence of two witnesses.
- Your two witnesses must sign the will in your presence
- Your two witnesses cannot be people who will gain from your will and they must be present with you at the same time for their attestation to be valid. The witnesses’ spouses/civil partners also cannot gain from your will.
- Your witnesses must see you sign the will but they do not have to see what is written in it.
- The signature or mark must be at the end of the will.

These are legal requirements and if they any of them are not met, the will is not valid. If you want to change your will after you make it, you can add a codicil (amendment or change) to your will; this codicil must meet the same requirements set out above.

The format of the will

You do not have to have your will in any set format. However, it is important that the will has the following:

- Your name and address
- A statement that says you revoke or disown all earlier wills or codicils, such as "I hereby revoke all former wills and testamentary instruments made by me and declare this to be my last will and testament".
- A clause or section of your will that appoints one or more executors, or people who will carry out your wishes in your will after you die, and stating these executors’ names and addresses.
- A residuary clause, which is a section in your will that sets out how property not effectively dealt with in the will should be distributed. This is important because specific bequests, such as "I leave x...... to Sean Murphy" can fail (be considered invalid), and then revert to the residue to be decided by this residuary clause. Your residuary clause could say that anything not covered in your will would be a gift or legacy to someone, like "The remainder of my estate I leave to my daughter, Mary".
- Your will should be dated and signed by you and your witnesses. Usually, these signatures are underneath a line in the will that states "Signed by the testator in the presence of us and by us in the presence of the testator". This statement is called “an attestation clause”. An attestation clause is not a formal requirement of a valid will, but it is advisable to include it in your will as it constitutes evidence that your will has been validly executed.
What if the testator is unable to sign or make a mark?

If you are unable to sign your will due to ill-health or illiteracy, it is acceptable for you to sign your will by means of a mark.

If you are physically disabled to the extent that you are unable to sign or mark your will, it is possible for you to direct an agent or representative to sign your will for you. Your agent must sign the will in your presence and on your direction and your two witnesses must be present. You then adopt this signature as your own.

The sound mind requirement

In order to make a valid will, you must not only set out your wishes in a written and witnessed document, but you must also have, in the eyes of the law, the mental capacity to do so. This means you must make your will with “understanding and reason” and not be suffering from mental conditions such as delusion, insane suspicion or aversion.

It is your mental condition at the time you made your will that is legally relevant. If you suffer from any mental disorder, it is important that evidence is left with your will (for example, from a doctor) that proves you were mentally competent at the time you made the will. Otherwise, your will can be open to challenge.

Your will can also be challenged on the basis that you were acting under pressure or undue influence when you made it so it is important that you get independent legal advice and not use the services of a solicitor of any potential beneficiary of your will.

Changing or revoking your will

If you want to change your will, you and your witnesses must sign or initial the will in the margin of the page beside the changes. You can also change your will in the form of a memorandum or written note that is signed by you and your witnesses that refers clearly to the changes.

To change your will, you can also make a separate document, called a codicil, which is like an update added to the end of your will. This document, again signed by you and your witnesses, should set out clearly and accurately the changes you want to make to your will. These changes are then legally binding.

However, if you plan to make a lot of changes to your will, instead of adding a codicil, it might be easier to simply revoke or disown your current will and make a new one, using the same procedures.

It is always possible for you to revoke your will. This can only be challenged if your mental capacity when you revoked your will is called into question.

Your will shall be revoked automatically in certain situations:

- If you marry or enter into a civil partnership, your will shall be revoked, unless your will was made in contemplation of that marriage or civil partnership.
- If you make another will, the first will you made shall be revoked.
- If you draw up a written document that is executed in accordance with the requirements for a will, your first will shall be revoked.
- If you burn, tear or destroy your will, it will no longer be considered valid. Or, if you have someone else destroy it, your will shall be revoked, provided this was done in your presence, with your consent, and with the intention of revoking your will.
Legal rights of spouses, civil partners and children when there is a valid will

In general, you are free to dispose of your belongings or estate as you wish, but your will is subject to certain rights of spouses/civil partners and other more limited rights of children. These rights are set out below.

Rights of a spouse or civil partner

If you have left a will, and your spouse/civil partner has never renounced or given up his/her rights to your estate, and is not “unworthy to succeed” in legal terms, then that spouse/civil partner is entitled to what is called a “legal right share” of your estate. This legal right share is:

- One-half of your estate if you do not have children
- One-third of your estate if you do have children

Your spouse/civil partner does not have to go to court to get this share, as any executor is obliged to grant this share where applicable. You can also make a bequest in your will that increases your spouse’s/civil partner’s legal right share, although if you do not specify that this gift is meant to be in addition to his/her legal right share, the executor may consider it part of that share and not an extra element to it. Your spouse/civil partner can choose to take either the assets specified under the will or his/her legal right share. The executors must inform your spouse/civil partner in writing of his or her right to choose between these two options and your spouse/civil partner must exercise this right within 6 months of receipt of notification or within 12 months of the taking out of the Grant of Representation.

Renouncing or losing rights under a will

It is possible for a spouse/civil partner to renounce his/her rights to the legal right share. This can form part of an agreement prior to marriage/civil partnership, for example, in the case of a second marriage, or the spouse/civil partner may set aside his or her rights in order to favour any children. However, any such renunciation may be ignored in certain circumstances, for example, if there is evidence of undue influence or evidence that the spouse/civil partner did not understand what he/she was doing or did not have independent legal advice.

If a couple is separated, a renunciation of each other’s right to the legal right share is usually included in a separation agreement. Divorce or dissolution of a civil partnership, however, automatically ends succession rights.
Cohabiting partners have no automatic legal right to each other's estates, although under the redress scheme for cohabiting couples introduced by the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 a qualified cohabitant may apply for provision to be made from the estate of a deceased cohabitant. Cohabiting partners can make wills that favour each other. These wills, however, cannot cancel out the legal rights of a spouse/civil partner if someone is separated but not divorced or their civil partnership dissolved.

Being judged “unworthy to succeed” is relatively rare, and would arise, for example, if the surviving spouse/civil partner had murdered or committed certain other serious crimes against the deceased. It could also apply if the spouse/civil partner had deserted the deceased for at least two years before death.

Rights of children under a will

Unlike a spouse/civil partner, children do not have any absolute right to inherit their parent's estate if the parent has made a will. Children born inside or outside marriage and adopted children all have the same rights and there are no age restrictions.

However, a child may make an application to court if he/she feels that he/she has not been adequately provided for. It is important to seek legal advice before making such an application. An application must be made within 6 months of the taking out of a Grant of Representation. The court then has to decide if the parent has failed in his/her duty to the child in accordance with the needs of that child.

Each case is considered individually, but it is important to remember that the legal right share of the spouse cannot be infringed in order to give the child a greater share of the estate. It can, however, reduce the entitlement of a civil partner.
The family/shared home

The surviving spouse/civil partner may require that the family/shared home be given to him/her in satisfaction of his/her legal right share, although if the house is worth more than the legal right share, the spouse/civil partner may have to pay the difference into the deceased's estate. A court may decide that this sum does not have to be paid if it would cause undue hardship to the spouse/civil partner or dependent children.

Giving away property in order to disinherit

If a court finds that the deceased person gave away property before he/she died with the intention of defeating the interest of or unfairly reducing the legal right share of a spouse/civil partner or child, a court order may be issued to the person who received the property, making that person a debtor of the estate, and requiring them to pay back an amount to the estate.

Gifts that fail

Remember that any legacy or gift in your will could fail for many reasons.

- If your will states that you are leaving an asset to someone and you no longer have the asset or the asset no longer exists, then the gift fails, or is in ademption.
- If you leave a gift to a person who is a witness to your will.
- If the gift is not clearly identified in your will or it does not conform to its description in the will.
- Your gift lapses, or no longer applies, if the beneficiary dies before you do. If this happens or if the beneficiary refuses to accept the gift, your gift goes back to your residuary clause, or if you do not have one a residuary clause, into intestacy.
- Your gift will not lapse, however, if the beneficiary who dies is a child or other descendant of yours, such as a grandchild, but whose child (or other descendant) is still alive. In that case, the gift becomes part of your deceased beneficiary’s estate for distribution according to their will or intestacy.
How wills are interpreted

Most wills are not disputed, but if there is a disagreement, it must be settled in court. The court will give effect to the testator or will-maker's wishes as expressed in the will. The testator’s wishes are derived or taken from a reading of the will as a whole, with words and phrases taken in their ordinary meaning unless they are technical words and it can be assumed the testator meant them to be taken in their technical meaning.

Extrinsic evidence, or evidence outside the will, such as letters or notes that refer to the will in advance of its making, may be introduced to the court to explain more fully the testator's intentions and to help ascertain the true meaning of the will.

Where two interpretations of a provision in the will arise, the court will lean in favour of the interpretation that upholds that bequest. Because wills can be disputed, it is important that you write your will in simple, straightforward language.

Property abroad

If you have property in other countries, it is generally considered advisable to make a will in each of those countries due to possible differences in succession law. Under EU Regulation 650/2012 on matters of succession (Brussels IV), if you have property in another EU member state, apart from the UK or Denmark, you can direct in your will that the law of your nationality should apply to the property.

Status of wills as public documents

After probate has been taken out on a person's will, that will then becomes a public document and a copy of the grant and the will can be obtained by anyone from the Probate Office or relevant District Probate Registry using (Form PAS1). The grant sets out the name and address of the executor or administrator of the estate and the name of the solicitor acting on their behalf (if any). It also sets out the gross value and the net value of the estate.

Detailed information about the estate is not normally available to the general public, however, certain people may be able to inspect the Inland Revenue Affidavit which contains the detailed information.

They include:

- A beneficiary who is named in the will
- Someone who is entitled to a share of the estate
- A child who is entitled to bring proceedings against the estate under Section 117 of the Succession Act 1965

Information on obtaining a copy of a will is available on the Courts Service website as well as in the information notes of Form PAS1. The Probate Office also sends copies of the will, the Grant of Representation and the Inland Revenue Affidavit to the Revenue Commissioners.
Will substitutes

Joint bank accounts or joint ownership of property are valid ways of deciding the fate of your assets in your own lifetime, but making a will can eliminate most potential disputes.

Joint bank accounts

Where joint bank accounts are opened with a spouse/civil partner or child, it is presumed that one party will be fully entitled to the money in the account when the other party dies. Disputes can arise, however, if someone, perhaps an elderly person or a person with a physical disability, opens a joint bank account with a relative or friend so that the relative or friend can manage his or her finances for him or her. This is because the owner’s intention may or may not have been to benefit the relative or friend. A decision in such a case would depend on the intention of the people involved, the amount they each lodged into the account and the terms of their contract with the bank.

It is advisable for people with joint accounts to make clear in their contract with their bank or in their will what their intentions are for the money in such accounts.

HOW TO APPLY

A solicitor will be able to help you draft a will or you can write it yourself.

If you are an executor seeking probate, you may make a personal application for a grant of probate to the Probate Office or to one of 14 District Probate Registry offices. You should go to the District Probate Registry Office in the area where the deceased lived at the date of death. If the deceased lived at the time of his or her death in Dublin, Meath, Kildare or Wicklow or lived outside Ireland, application for a grant of probate must be made to the Probate Office in Dublin.

WHERE TO APPLY

Probate Office
Personal Application Section
First Floor
15/24 Phoenix Street North
Smithfield
Dublin 7
Ireland
Tel: +353 (0)1 888 6174 or +353 (0)1 888 6728
Homepage: www.courts.ie
E: ProbatePersonalApplications@courts.ie