# Succession Planning:
## Wills and Powers of Attorney

by Brendan Sharkey

**The Covid-19 crisis is a stark reminder to us all of our own mortality. The virus is indiscriminate and attacks the rich, poor, sick and the healthy. It has now provoked many people to ask themselves what would happen if they suddenly contracted the virus and are among the unfortunates that die as a result. It has challenged many people to look at their current state of affairs and ask if they have adequately planned for their death, incapacity or indeed immobility.**

There is no doubt that accountants, financial advisors and solicitors have seen an uplift in requests for advice on estate planning and the drafting of wills during the current crisis. Readers of this article will be familiar with the various taxation reliefs which would normally be considered in any succession plan and it is not intended to deal with these aspects here. Rather, the purpose of this article is to advise readers on a number of legal concepts that must be borne in mind when formulating any succession plan and to point out certain pitfalls. For example, it can be easy to commit a person's assets to paper, but have you properly considered the legal restrictions and obligations imposed by Irish Law which need to be considered as part of your succession plan?

Readers also need to bear in mind situations where your client may not necessarily die but becomes incapacitated either mentally or physically and as a result, cannot actively manage their own assets. Who will take up the reins?

### Wills – legal considerations

There are a number of important considerations which you as financial advisors should bear in mind when formulating a plan for the division of your client's assets. A number of these considerations are as follows:

#### 1. Revocation of older Wills

If an existing Will no longer reflects how an estate is to be devolved on death, then it must be revoked immediately! Take the proper steps to validly revoke the Will. I use the word "proper" because revocation of a Will must occur in a specific manner.

For example, telling a beneficiary that you no longer wish for that beneficiary to have part of your estate will be ineffective unless you have taken the correct steps to revoke that bequest. The normal way this occurs is by having an express written clause to this effect in your new Will revoking your prior Will. Otherwise, a document which intends to revoke a Will must be executed in the same manner in which a Will is executed. A simple letter or other note declaring the intention of the Testator that his prior Will is no longer to be of effect may not suffice.

The Succession Act[1], 1965 provides that a Will can be revoked by *"the burning, tearing or destruction of it by the Testator or by some person in his presence and by his direction with the intention of revoking it."*

One also needs to be wary about unintentionally revoking Wills. The Succession Act, 1965 provides that a Will is revoked by subsequent marriage (or civil partnership) of the Testator, except a Will made in contemplation of that marriage or civil partnership.

#### 2. Marital status

This is a key consideration. If your client is married or has entered a civil partnership and has no children, then the surviving spouse or civil partner has a right to one half of the deceased's estate. If your client dies leaving a spouse or civil partner and children, then the surviving spouse or civil partner has a right to one third of the estate.[2] This entitlement is known as the "legal right share". It is worth noting that a spouse or civil partner can seek the family home in full or part satisfaction of that legal right share.

Any bequest in a Will which attempts to disinherit a spouse or civil partner or leaves less than the legal right share could be subject to challenge. In fact, the Succession Act[3] specifically provides that the right of a spouse or civil partner has priority over devises, bequests and shares on intestacy.

It is also worth noting the Succession Act does provide a mechanism whereby spouses or civil partners can renounce their entitlements to a legal right share and using such a renunciation can be a useful tool in estate planning.

[1] Section 85, Succession Act, 1965.
[2] Section 111, Succession Act, 1965.
[3] Section 112

### 3. Separation and divorce

If your client tells you that they have separated from their spouse then do not just take this at face value! Ensure that you get a copy of the agreement which sets out the agreed terms of the separation or a copy of the divorce decree. Just because two parties have separated does not mean that they are no longer spouses in the eyes of the law. A properly drafted Separation Agreement should contain waivers to estates and the legal right share.

It goes without saying that once a person has entered into a Separation Agreement or gone through the judicial separation or divorce process, then that person must change their Will. For example, the act of signing a Separation Agreement does not automatically void a Will in which that person may have left the entirety of their estate to the spouse they have just separated from. Unfortunately, in some cases this rudimentary step has not been taken.

Furthermore, where a person has obtained a decree of divorce in a foreign country, then one needs to be sure that such a divorce is in fact recognised in the Republic of Ireland. The obvious risk is that should the divorce decree not be recognised then the marriage could be still deemed to exist under Irish law.

### 4. The aggrieved child

Children do not have a legal right to demand a proportion of a deceased parent's estate where a valid Will is in place.[4]

The Succession Act, 1965[5] does however allow a court to make provision for a child out of a deceased's estate where they deem that the testator has failed in their "moral duty" to provide for that child under the Will. There is a plethora of case law on this section and it is used where children feel aggrieved at not having been provided for in the Will of a deceased person. Such an action can throw the proverbial "cat amongst the pigeons" for a succession plan. Careful consideration to this provision must be given at the outset.

### 5. The unintended beneficiary!

Be wary of Section 98 of the Succession Act, 1965. This section is commonly misunderstood, but its effect is to prevent a bequest or inheritance to a child or issue of a testator from lapsing where that child or issue predeceases the testator and leaves children. The section operates to vest the bequest in the estate of that deceased child.

By way of example, if Brendan by his Will leaves a bequest of €100,000 to his son, John but John predeceases Brendan then the bequest to John will not lapse provided that John has issue living at the date of Brendan's death. This section provides an exception to the doctrine of lapse and it operates to vest the subject matter of the bequest in the estate of the deceased's beneficiary. Clearly, where John has made a Will leaving the entirety of his estate to his wife then the effect of Section 98 is to pass that bequest of €100,000 to John's wife. In many cases this will not be desirable and thus appropriate wording needs to be inserted in the Will to guard against this.

### 6. Rejoice for the joint tenant!

Creation of a joint tenancy is a simple but effective means of passing an asset to a beneficiary by survivorship. This is particularly effective where it is intended that a surviving spouse shall take the deceased's interest in property or monies in a bank account. It means that the surviving beneficiary can readily access that asset without having to wait for probate to be extracted.

Normally, banks will amend the name on a joint bank account upon production of a death certificate unless there is a contrary intention shown. Furthermore, the Land Registry will amend the title on particular folios upon the surviving joint tenant swearing the necessary affidavit. This all serves to ease the overall administration process and associated cost. Indeed, where two spouses have a clear intention that the surviving spouse should take the entirety of their combined estates then probate may not be required at all once the assets are held in this manner.

## Powers of attorney

The use of Powers of Attorney can be effective where a person is unable to make a decision with regards to their assets due to incapacity, immobility or not being present in the jurisdiction. It is important to distinguish between a Power of Attorney and an Enduring Power of Attorney.

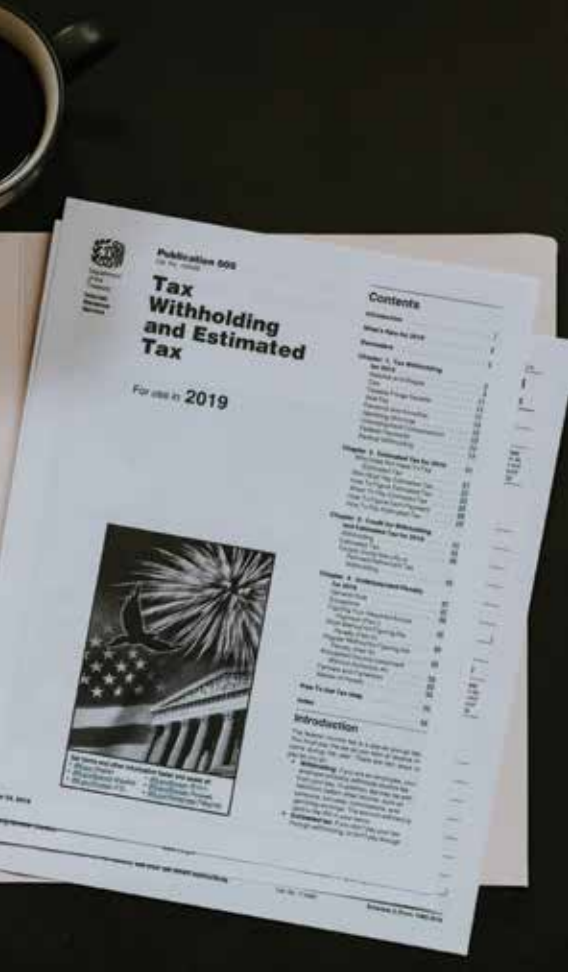
### 1. Power of Attorney

A Power of Attorney gives a person either a specific or general power to do acts in the name of the person giving it (the "Donor").

---

[4] Note – On intestacy (i.e. where no Will is made), children do have an automatic statutory entitlement to a proportion of the estate[5] Para 3.9 FRS 102, The Financial Reporting Standard applicable in the UK and Republic of Ireland

[5] Section 117




An example of where a Power of Attorney would be used is where a person is selling a property and will not be in the country on the date on which the sale Contracts are to be signed. The Donor would therefore give a nominated person authority to sign the contracts on their behalf by way of a Power of Attorney.

In other cases, it can be used where persons lack the mobility to attend at banks and sign necessary banking documentation. In that instance, a Power of Attorney can be given to a trusted friend or relative to carry out those tasks on that person's behalf. This type of use has however become less prevalent with modern day banking.

A Power of Attorney loses effect as soon as a Donor becomes mentally incapacitated or dies. Furthermore, it can be revoked. It does serve as a useful tool to allow certain transactions or other matters continue when the Donor may not be physically able to attend to the necessary signing.

### 2. Enduring Power of Attorney

An Enduring Power of Attorney can be registered (and thus becomes effective) when the person who makes it (again the Donor) loses or is in the process of losing mental capacity. The Donor will have executed the Enduring Power of Attorney in contemplation of that event. One need not be elderly to lose mental capacity and it can occur to persons at any age. Many people find comfort in having an Enduring Power of Attorney in place to cover them in a situation of future incapacity due to, for example, stroke, accident or diseases such as Alzheimer's or dementia.

The process of putting an Enduring Power of Attorney in place is relatively straightforward. The essential parties are as follows:

- **The Attorneys –** these are the person or persons the Donor will nominate to look after their affairs.
- **Notice parties –** two persons must be nominated by the Donor upon which notice is served that the Enduring Power of Attorney has been put in place. This is a safety mechanism as the Attorneys are required to also notify the notice parties in the future if they seek to register the Enduring Power of Attorney.
- **Doctor –** there is a form of certificate to be signed by the Donor's doctor to confirm that the Donor was of full mental capacity at the point the Enduring Power of Attorney was signed.
- **Solicitor –** the Donor's solicitor must confirm the Donor understood the effect of creating the Enduring Power of Attorney.

It is important to note that the actual act of signing the Enduring Power of Attorney does not mean that it can be acted upon by the attorneys immediately upon the Donor losing mental capacity.

There is a process by which the Enduring Power of Attorney must be registered in the Wards of Court Office and the application for registration must be backed up with medical evidence that the Donor has in fact lost mental capacity.

The benefits of an Enduring Power of Attorney are that it is a cost effective way of ensuring your personal affairs are looked after should a person lose mental capacity in the future. The actual process of registering the Enduring Power of Attorney in the Wards of Court Office is also straightforward and relatively quick. The downside of not having such a document in place is that one must go through the Wards of Court process which is more time consuming and less personal.

## Conclusion

You will have seen there are a number of pitfalls imposed under Irish law which one needs to be wary of when drafting a Will. The risk of not doing so is that any intended succession plan could be challenged. In addition, the use of Powers of Attorney serve as useful tools for clients in their daily lives and in particular it is advisable to have an Enduring Power of Attorney in place. It is unfortunate that for many people the current crisis has greatly accelerated the implementation of those instruments. Stay safe!

**Brendan Sharkey**

Brendan is a Partner in the Probate and Estates Department of Reddy Charlton Solicitors, 12 Fitzwilliam Place, Dublin 2. Brendan advises clients in relation to all matters relating to Will drafting and estate administration.