



SMART START

FINANCIAL SERVICES

IT'S NEVER TOO LATE TO TAKE CONTROL

Smart Start Financial Services Estate Planning

There are some key terms and documents that are used throughout the Estate Planning process, as well as key roles with which you should be familiar. These terms and roles will come up again and again, not only in the planning process, but also if you are managing the death of a loved one.

To help you navigate the planning process, we have compiled here a list of some of these key terms, documents, and roles with short easy to understand explanations.

For information about our 3 step Estate Planning process, please see our [Estate Planning brochure](#).

Definitions

Will

A Will is a legal document that holds your instructions about what to do with your assets and belongings when you die. It is important that you should have in force a Will which is appropriate to your wishes, thereby avoiding dying intestate (that is, without a legal Will) and the additional trauma this may cause to loved ones surviving you. Matters to receive attention in a Will include:

- **Beneficiaries** - those who will receive your belongings and assets when you die. Your Will details not only those that you would like to receive all or part of your estate when you die, but those who will benefit if your first-choice beneficiary (or second or third) predeceases you. This is particularly important in the case of your children and their children.
- **Executor** - those who will be responsible for implementing the instructions in your Will including selling and distributing assets. You should choose an executor who is unlikely to predecease you and an alternative executor. We feel it is important that the executor be someone in tune with your wishes. The technical side of managing a deceased estate is easily handled, provided your executor is aware of the services provided by professional solicitors, financial planners, and accountants.

- **Trustee** - a person who holds and administers property or assets for a third party (beneficiary). It is possible that some assets may be held for some time in trust for beneficiaries who have not yet reached the age you nominate for them to receive the bequest. You should nominate a trustee for these assets and also set guide-lines regarding authorised investments.
- **Specific bequests** - you may wish to consider leaving certain items to specific individuals. This may also have some Capital Gains Tax benefits, and it may avoid the need for the executor to sell an asset of the estate.

Power of Attorney

- **Power of Attorney** - A Power of Attorney is a formal document by which one person appoints another to represent them and/or act in their stead. It may be specific, for example, a power granted to operate a nominated bank account or sell a named property, or it may be a general Power of Attorney in which case the Attorney can act in the place of the person granting the Power of Attorney in all matters and things that an Attorney may lawfully do and perform as an Attorney.
- **Enduring Power of Attorney** - An Enduring Power of Attorney is much the same as an ordinary Power of Attorney with one distinct difference - it is not automatically revoked by the subsequent legal incapacity of the person granting the Power of Attorney. An ordinary Power of Attorney is revoked and should not be acted upon when the person granting the Power of Attorney becomes mentally incapable of looking after his or her own affairs.
- **Reasons for Appointing an Enduring Power of Attorney** - the most striking situations would arise where a person suffers injuries in an accident leaving that person with a mental incapacity or where a person suffers a stroke and can no longer either physically or mentally attend to the management of his or her affairs. The other obvious situations occur when the elderly lose that mental and physical capacity they once had in the prime of their life. At that stage they need someone to attend to their affairs and be able to act fully and effectually in a legal manner.

Please note that after you have lost your mental capacity to act in legal matters it is too late then to appoint a person as your Enduring Power of Attorney.

- **Appointing an Attorney** - You should appoint someone who is mature, responsible and who you trust completely and without reservation. Couples in their youth through to the middle age bracket should consider appointing each other. The elderly should consider appointing either one or two (jointly and severally)* of their children. There is no restriction as to who can be appointed. However, it is most important that the proposed appointment be fully discussed with the person or persons proposed to be appointed

* **Jointly** means they need to both sign/agree on any decisions. **Severally** means they can act on the Enduring Power of Attorney individually. **Jointly and severally** means they can act either together or individually.

Obligations of the Attorney

A person appointed as Attorney must also sign the Enduring Power of Attorney and accept the responsibility of exercising the powers in accordance with the rules of law as enacted by Parliament.

Here is a summary of those provisions:

1. The Attorney must at all times exercise the powers honestly and with reasonable diligence to protect the interest of the donor (the person granting the enduring power of attorney).
2. The Attorney should not enter into transactions on behalf of the donor which may involve a conflict between the Attorney's interests and those of the donor, unless the transaction is explicitly authorised by the donor. For example, if it is necessary to sell some of the donor's property, it may be a breach of obligation to sell it to the Attorney's relative.
3. The Attorney must keep their money and property separate from the donor's money and property, unless the Attorney is a joint owner, or operates joint bank (or similar) accounts. This is a situation most likely to arise where couples appoint each other as their Attorney.
4. The Attorney must keep proper accounts and records of how they handle the donor's money and property. The Public Trustee, or anyone interested in the donor's welfare, can require the Attorney to produce these accounts and records.
5. If the Attorney does not carry out their duties properly, they may be required to compensate the donor for losses.
6. If, after the donor becomes incapacitated, the Attorney wishes to stop being the donor's Attorney, they should seek legal advice.

Procedure for Appointing an Attorney

We strongly recommend that your Enduring Power of Attorney be properly drawn up by a solicitor. A solicitor can take instructions from you and advise you in relation to the preparation of such a document.

Revoking Power of Attorney

You may revoke an Enduring Power of Attorney at any time in the future if you wish, provided that at the time you have the necessary legal capacity, that is, provided that your mental health is such that you can act in a legal manner on your own behalf.