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# Wealth and Estate Planning Conference 2022

Presenter: Multi Speaker

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# Issues and opportunities in advising family businesses

**Ken McCracken**

12 May 2022



# Issues

## 1. Don't KISS

## 1. Don't KISS

- *Cannot separate the family and the business*
- *Every family business is a complex network of relationships*
- *Role confusion and conflicts of interest*

# Who are you talking to?

- Shareholder
- Managing director

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- Managing director
- Trustee of family trust that owns shares

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- Trustee of family trust that owns shares...
- ..and of the charitable trust and employee trust
- Pension fund trustee



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Help clients to avoid conflicts of interest?

# Who are you talking to?

- Shareholder
- Managing director
- Trustee of family trust that owns shares
- ..and of the charitable trust and employee trust
- Pension fund trustee
- Child, parent, in-law, uncle
- **Grieving spouse**

# Opportunities

1. Family business education (STEP; Family Firm Institute)
2. Develop a family business-centric approach
3. Inter-disciplinary collaboration

# Current issues

2. Successful family enterprises are well governed

## 2. Successful family enterprises are well governed

- *Natural governance*
- *Move forward by adapting the past*
- *Silo governance*

## 2. Successful family enterprises are well governed

*The Governance Marathon:  
Dynamic Durability in Entrepreneurial Families Amid Disruptions  
FFI Research Report (2021)*

# Opportunities

1. Family business education (STEP; FFI)
2. Develop a family business centric approach
3. Inter-disciplinary collaboration
4. Do diligence (*first seek to understand...*)
5. Beyond best practice



# Best practice - Definition

Excessive generalisations from selected examples leading to complex family businesses being reduced to facile slogans that are falsely presented as universal laws.

# Current issues

## 3. Demographics

- Longevity
- Timing of transitions
- The concept of a family and who is in the conversation

Who is family for the purpose of...

- a) Being an owner
- b) Getting a job in the business
- c) Joining the board
- d) Coming for dinner at the weekend?

# FFI World Conference



- The Demographics of Evolutionary Behaviour
- Modern Family: The impact of demographic changes on the future of family
- How Identity is Changing the Face of Family (Enterprises)
- Back to the Future: Time travel and interdisciplinary advising in the fourth economy.

*MIT Management School, Boston, 26 – 29 October 2022*

# Opportunities

1. Family business education in family business systems
2. Develop a family business centric approach
3. Inter-disciplinary collaboration
4. Do diligence (*first seek to understand...*)
5. Beyond best practice
6. Supporting elders (training, mentoring, coaching, networking)
7. More complex problems to be solved !

# Summary

## Issues

1. Don't KISS
2. Successful family businesses are well governed
3. Demographics

## Opportunities

1. Family business education
2. Develop a FB-centric approach
3. Inter- disciplinary collaboration
4. Diligence to build relationships
5. New approaches beyond best practice
6. Supporting elders
7. More complex problems to be solved !

## ...another challenge

- Every family business is a network of relationships in which no-one can get everything they want.

## ...another challenge

- Every family business is a network of *anxiety inducing* relationships



# The following are normal

## Conflict

Occasional arguments

## Distancing

Stay out of each others way/not talk about it

## Cut-off

"I'm off"

## Reciprocity

Over-functioning and under-functioning

## Triangling

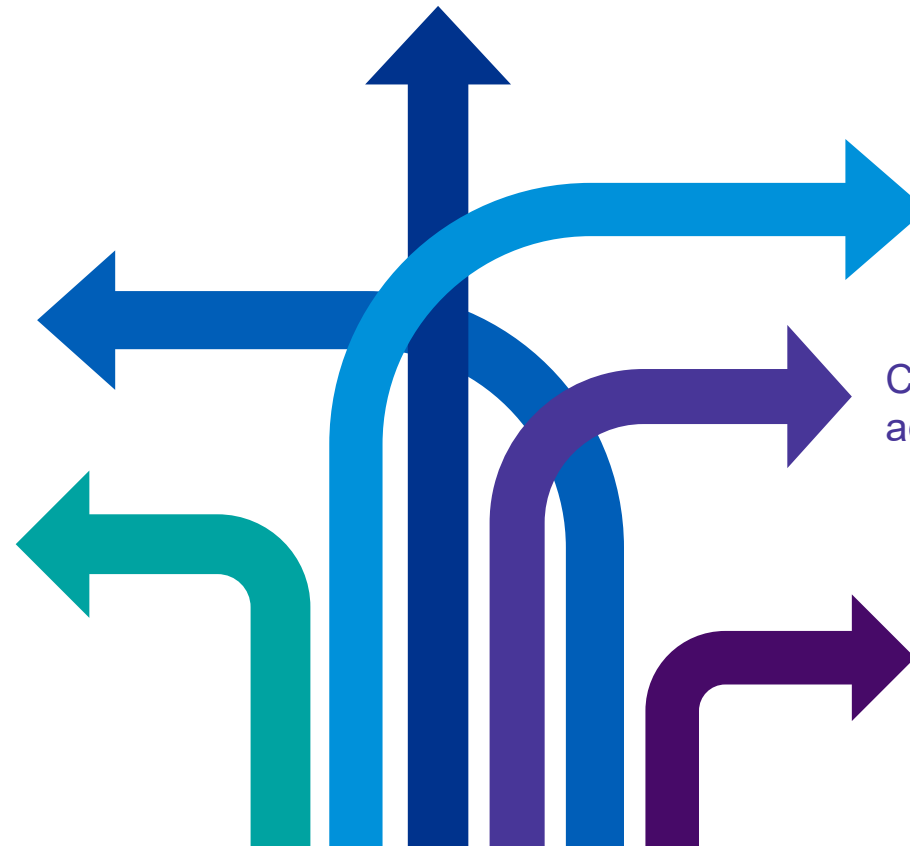
I'll speak to someone

# Beware our reactions

Interpret what's happening through  
the prism of a specialism

Ignore emotion – get on with the  
real (??) issues

Attribute it to personality  
rather than seeing it as  
systemic



'Side' with the people we like  
or those that are like us or who  
control the purse strings

Confuse swift action with good  
advice

Call it 'dysfunctional' !!!

# ISSUES – CHALLENGES – OPPORTUNITIES



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# Thank you

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# Topical Wealth and Estate Planning Tax Issues - NI

Alan Gourley, Tax Partner, Grant Thornton (NI) LLP

12<sup>th</sup> May 2022



# Topics to be covered

1. Changing landscape for tax residence of individuals and corporates
2. Extracting wealth from family businesses



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# Changing landscape for tax residence of individuals and corporates

# 1. Changing landscape for tax residence of individuals and corporates

## Co-ordination, monitoring & payroll

How do you know who is working where? Is there a requirement for a foreign payroll? Is there a double tax treaty and if so, what does it say?

## Legal issues

Visas, employment contracts, insurance, use of data, health & safety, etc.

## PE risk

Where senior employees are working in another country this could create a PE and direct tax exposure. Some limited relaxation during Covid

## Social security

Understanding the relevant exemptions. Can be easier for EU / EEA countries than for ROW

## Tax policy

Who is going to bear any additional tax costs? Is there a tax equalisation policy in place? Links to wider reward and retention strategy

## Directors

Special considerations exist for statutory Directors



**Working from home  
while abroad**





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# Extracting wealth from family businesses

## 2. Extracting wealth from family businesses – choice of entity and remuneration strategy

- The introduction of the additional 1.25% levy has had an impact on the numbers for 2022/23

### 2022/23: Amount retained by individual for every £100 of profit extracted by dividend, salary / bonus or LLP

	Dividend	Salary / bonus	LLP
	£	£	£
Additional rate taxpayer	49.13	44.98	51.75
Higher rate taxpayer	53.66	49.33	56.75
Basic rate taxpayer	73.91	58.02	69.75

- Dividends are now better than salary / bonus at every tax rate
- But an LLP produces a better outcome for additional rate and higher rate taxpayers

## 2. Extracting wealth from family businesses – choice of entity and remuneration strategy

- The increase in the corporation tax rate from 19% to 25% from 1 April 2023 has a negative impact on the tax efficiency of taking dividends

**From 2023 onwards: Amount retained by individual for every £100 of profit extracted by dividend, salary / bonus or LLP**

	<b>Dividend</b>	<b>Salary / bonus</b>	<b>LLP</b>
	<b>£</b>	<b>£</b>	<b>£</b>
Additional rate taxpayer	45.49	44.98	51.75
Higher rate taxpayer	49.69	49.33	56.75
Basic rate taxpayer	68.44	58.02	69.75

- Dividends are now only slightly better than salary / bonus at every tax rate
- But an LLP produces a better outcome for all taxpayers

## 2. Extracting wealth from family businesses – choice of entity and remuneration strategy

### Other considerations:

- Salary is easier to manage than dividends – administratively and cash flow
- Salary counts towards mortgage approval, income protection, death in service, etc.
- Salary can also be a relevant cost for company claiming R&D tax relief
- An LLP is still not a widely recognised vehicle for a trading business



## 2. Extracting wealth from family businesses – choice of entity and remuneration strategy

- If Shareholder / Director has made a loan to the company, **interest** can be charged on the loan. This is tax-deductible for the company and whilst is taxable on the individual there is no NIC payable. The rate of interest rate should be no higher than a comparable market rate.
- If Shareholder / Director owns a property that is used by the company rent can be charged on the loan. This is tax-deductible for the company and whilst is taxable on the individual there is no NIC is payable. The level of rent should be no higher than a comparable market rate.
- It is important to note that there is a restriction for Business Asset Disposal Relief on the sale of the property if the property is occupied by a connected company and rent is paid.



## 2. Extracting wealth from family businesses – company purchase of own shares (CPOS)

- Normally the purchase by a company of its shares is taxed on the UK resident shareholders as a distribution / dividend (39.35% tax rate). The amount taxed as a distribution is the excess paid over the amount of the original subscription for the shares.
- If certain conditions are met (ss1033-1043 CTA 2010), then the payment can be treated as an exempt distribution and subject to capital gains tax.

## 2. Extracting wealth from family businesses – company purchase of own shares (CPOS)

- The main tax conditions are:
  1. Company is unquoted and is a trading company (or the holding company of a trading group)
  2. Payment is to benefit the trade and there is no avoidance motive
  3. Seller of shares is UK tax resident
  4. The shares being sold must have been owned by the seller for the 5 years ending with the date of purchase – can be reduced to 3 years when the shares were inherited
  5. Immediately after the payment, the seller's interest (aggregated with the interests of their associates) in the company must be substantially reduced – this means the aggregate interests after the payment must be less than 75% of the position before the payment
  6. Immediately after the payment, the seller must not be connected with the company. Again the interests of the seller are aggregated with their associates. Connection is defined as having more than 30% of the votes (whether conferred by equity or loan capital) or be entitled to more than 30% of the assets of the company on a winding up.

## 2. Extracting wealth from family businesses – company purchase of own shares (CPOS)

- There is a company law requirement that the payment must be made in cash. If the company does not have sufficient cash, there is the ability to structure the purchase with multiple completion dates. This complicates matters and HMRC have recently tightened the rules in respect of the connection test for multiple completion buybacks
- There is an advance clearance procedure for confirming with HMRC that a proposed payment will be treated as an exempt distribution (and therefore taxed as a capital gain). It is advisable at the same time to seek a clearance from HMRC that the payment will not be subject to counteraction by HMRC under the Transactions in Securities provisions
- Stamp duty will be payable by the company @ 0.5%
- There is also a requirement for the company to make a return to HMRC of any payments made which are treated as exempt distributions within 60 days



## 2. Extracting wealth from family businesses – UK pension planning

- The use of Registered Pension Schemes is generally the most tax-efficient mechanism for rewarding owner managers
- This is because:
  - There is tax relief on contributions made (whether by an individual or an employer)
  - The income and gains of the pension fund are exempt from tax
  - The fund remains outside the UK IHT regime
  - At retirement age (currently 55)  $\frac{1}{4}$  of the fund can be taken as a tax-free lump sum
  - The balance of the fund can be taken flexibly (taxed at marginal income tax rates)
  - Death benefits are paid tax-free (if pensioner dies before age 75)
  - The scheme can lend to the employer and buy commercial property

## 2. Extracting wealth from family businesses – UK pension planning

Some of the relevant rules:

- There is a limit for annual contributions (or accruals) of £40k per individual. Any used relief in past 3 tax years can be b/f
- This can be tapered down to £4k for those > £200k pa (complex)
- Any contributions in excess of the limit are taxed at the marginal rate of income – a self-assessment disclosure
- The limit is immediately £4k for any individual who has accessed their pension flexibly (care required)
- There is a lifetime limit for a fund of £1,073,100



**Alan  
Gourley**

Tax Partner Grant Thornton (NI)  
LLP

# About

- Tax specialist working with High Net Worth Individuals and Business Owners
- Chair of the Northern Ireland Tax Committee of Chartered Accountants Ireland
- Member of the HMRC External Forum for Wealthy Taxpayers



## Wealth transition / preservation within family businesses

12 May 2022

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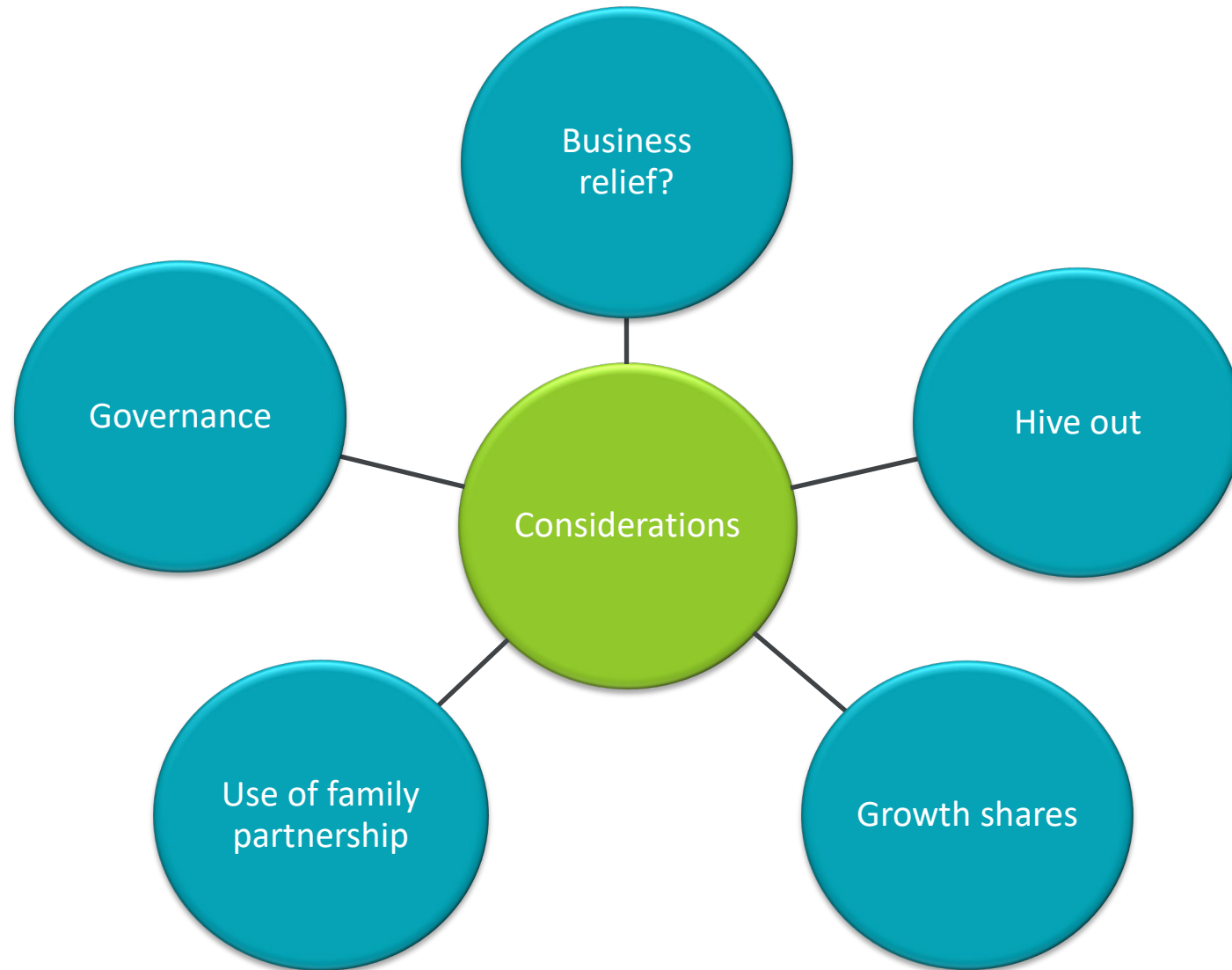
## Starting off – initial questions

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- What are the objectives?
- What is the age profile of the shareholders and the next generation?
- Does the current structure facilitate the efficient transition of wealth?
- Should a separate vehicle be established for non-business assets?
- Are there assets surplus to trading requirements?
- Do the shareholders have pension arrangements in place?
- Is there a 'death of a founder' plan in place?
- Are the necessary governance structures in place?

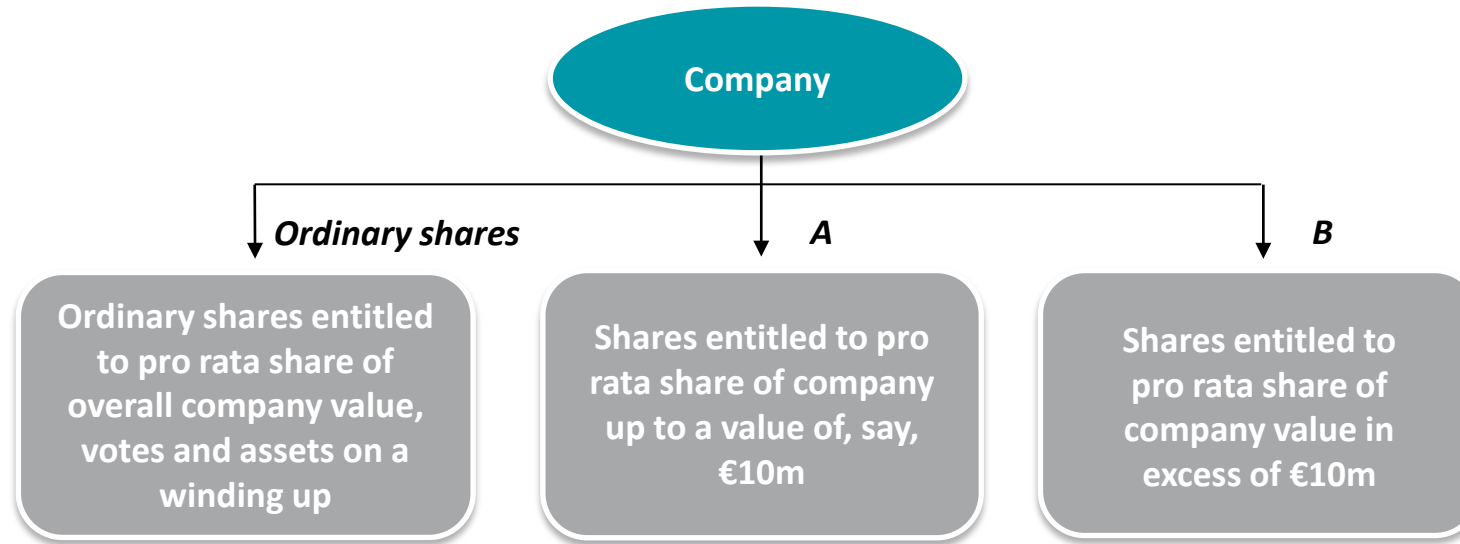
# Transition / preservation of wealth by a family in business – considerations

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# Growth shares

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## Implementation:

- Reorganise existing shares
- Ordinary shares will retain voting rights
- One class (A shares) will be entitled to value of company up to a predetermined limit, such as €10m
- Second class of shares (B shares) will be entitled to value of company in excess of a certain sum, such as €10m

# Growth Shares

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## *Growth shares – what are they?*

- Cap the value of the ordinary shares and issue growth shares – future value can then accumulate within growth shares
- No CGT on transfer

## *How should growth shares be held?*

- Issue growth shares to individuals personally:
  - ✓ Divergence of treatment re Irish resident and non-Irish resident shareholders on income and gains
  - ✓ Reward members of next generation working in the business via issuance of growth shares in subsidiary company
- Issue growth shares via a family trust:
  - ✓ Asset protection; benefit minor / incapacitated individuals
  - ✓ A trust will be liable to income tax plus an additional surcharge on accumulated income – effective rate of 40%
  - ✓ Accumulate income and make appointment of capital to settlor of trust free of CAT

## *When should growth shares be considered?*

- Retirement relief is unavailable
- To facilitate efficient transfer of values in non-business assets

## *Valuation of growth shares*

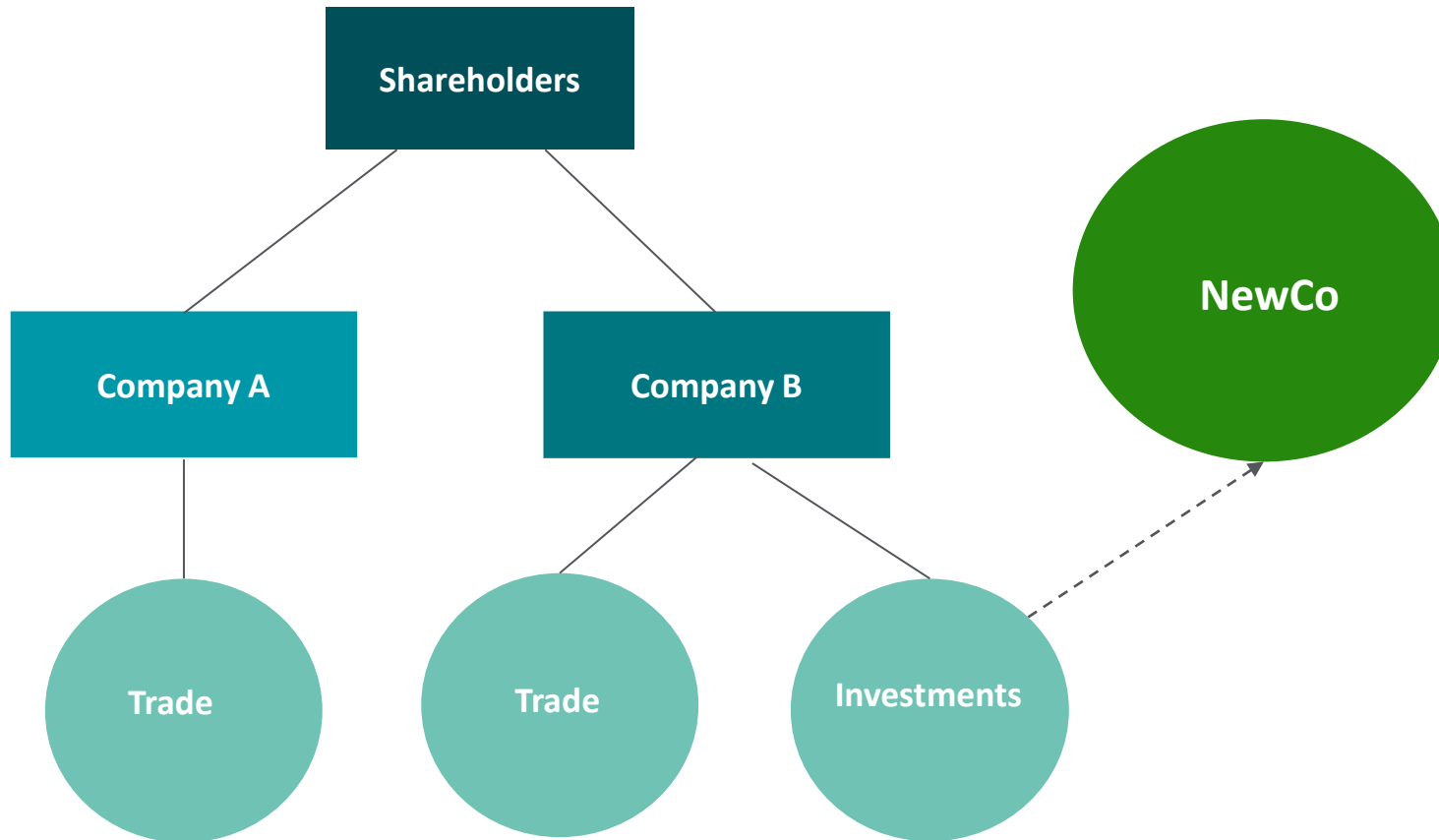
- Valuation exercise must be undertaken in respect of both the ordinary (capped) shares and the growth shares
- Revenue guidance on employee share schemes: expectation is that valuation method complies with ‘relevant accounting standards’.

## *What about the ‘capped’ shares?*

- The ‘current value’ of the business may be transferred to a family trust via Will
- Avoids an immediate charge to CAT at 33%
- Discretionary trust tax (“**DTT**”) will need to be considered – 6% once off charge and 1% annually thereafter



# Hive out



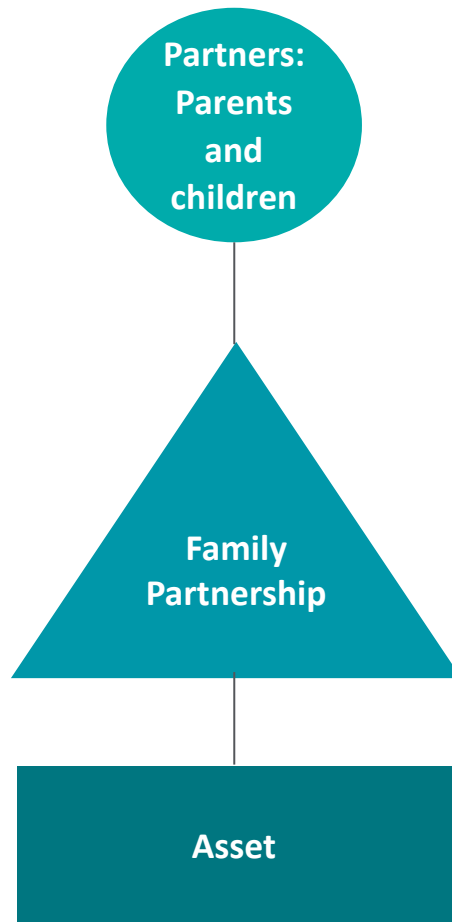
## Business relief ✓

Reduce taxable value by 90%

- Any non-business assets will be subject to CAT at 33%.
- Consider reconstruction to segregate the trading and non-trading assets
- NewCo is incorporated and investment assets in Company B are hived off into NewCo.
- If structured correctly, can be achieved in a tax efficient manner
- Business relief should now apply to appointment of shares in Company A and Company B (assuming relevant conditions are met)
- Consider settling non-trading assets on trust for children not involved in the business – deferring any charge to CAT.
- Discretionary trust tax would however need to be managed for any assets held on discretionary trust terms.
- Impact of recent TAC determination re ‘excepted asset’ in the context of business relief

# Use of Family Partnerships

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## *How to utilise a family partnership?*

- Transfer assets set to appreciate in value
- Transfer of business v non-business assets
- Gift funds to the next generation for investment via family partnership in other projects separate to the business

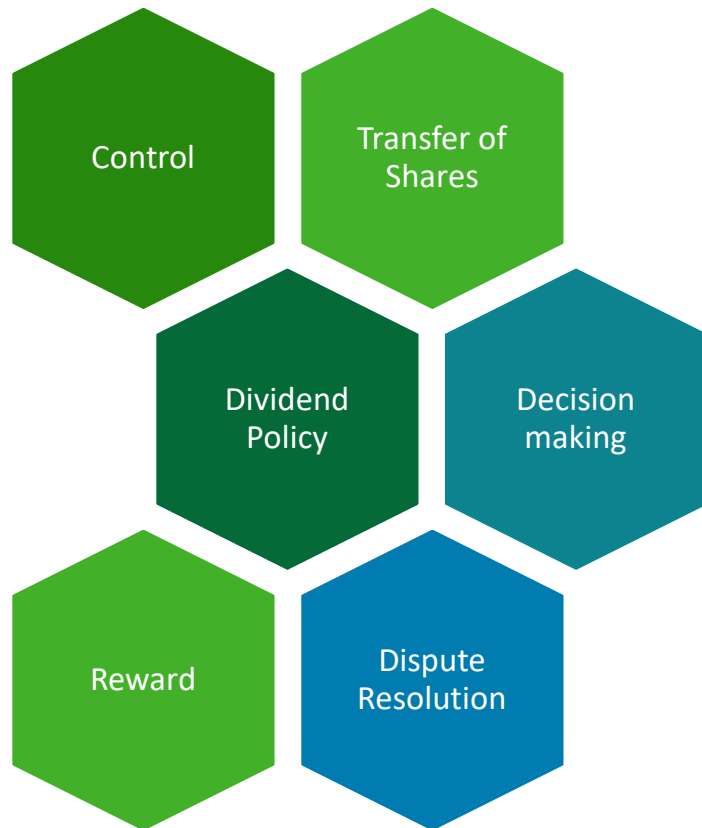
## *Ownership and Control*

- The next generation hold beneficial title to the partnership assets
- Members of the current generation hold controlling interest; they decide when and to what extent any value is paid out to the partners

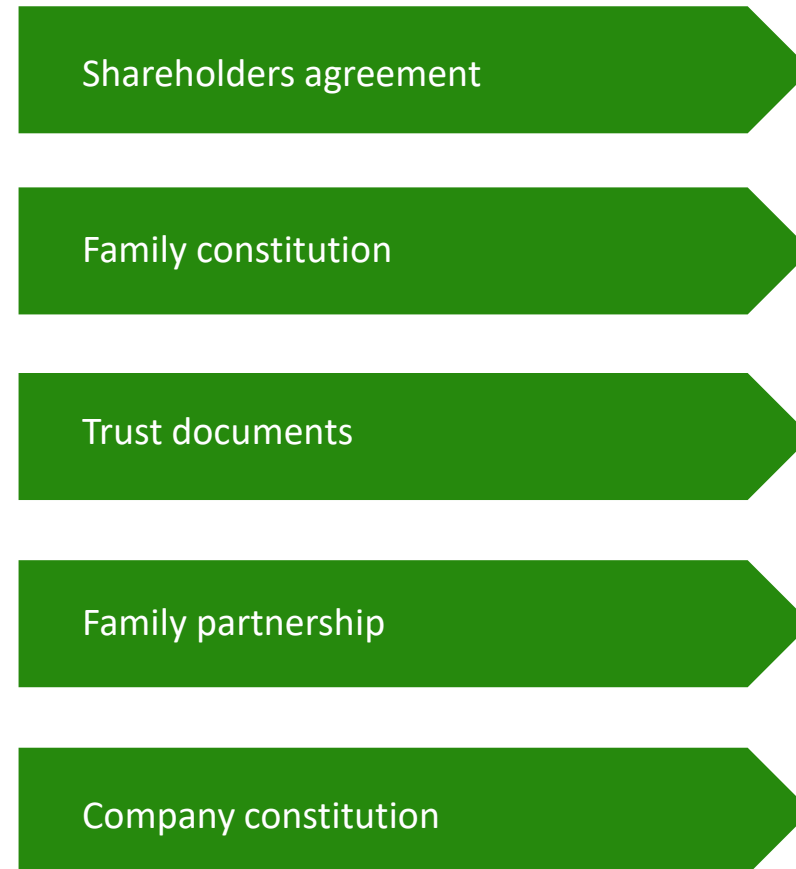
## *Tax implications*

- Transparent vehicle for tax purposes
- Transfer of assets to partnership within the charge to CGT and stamp duty
- Any increase in value of the partnership assets will arise tax-free to the next generation and would not be subject to gift or inheritance tax
- CGT on future disposal but net proceeds available to partners without incurring a further tax charge

## Issues encountered



## Governance arrangements





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# When it goes wrong: Disputes in Family Businesses/Partnerships and Mediation Process

## STEP and Chartered Accountants Ireland

12 May 2022





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**When it goes wrong: Disputes in  
Family Businesses/Partnerships and  
Mediation Process**

STEP and Chartered Accountants Ireland  
12 May 2022

## Eamon Harrington

- Disclaimer - personal views
- 5781 steps
- Success rate high
- Always valuable

## Mediation Generally

- Confidential
- Without Prejudice
- Prompt
- Cost effective
- Parties have control over decision making



## Mediation Generally (continued)

- More nuanced solutions
- More candid – less strategic
- Neutral – no decision

## Business Mediation

- Clients are heard
- Explanation opportunity
- Understanding of positions

## Business Mediation (continued)

- Important to understand the mediator's role and the mediation process.
- Not there to pass judgement but to facilitate a mutually acceptable commercial solution.
- Provides the best opportunity for negotiation and the quick resolution of otherwise time-consuming and expensive disputes.

## A typical mediation....

- Before
  - Agreement
  - Documentation
  - Submissions
- Beginning
  - Ground rules
  - Opening statements
- Joint Meetings
- Private Meetings
- Settlement?

## Who pays the costs of mediation?

- Norm is to share equally the costs of the mediator/venue
- Norm is to agree to bear one's own costs
- Occasional departure from these norms

- Best, whenever possible, is to ensure both parties have “skin in the game” i.e. an incentive to mediate in good faith
- Frequent moan – what if mediation does not succeed – who pays?

## Business Disputes– some features

- Not magic – requires movement
- Professional advisers have role to be advocate but also voice of reason
- When client is present, may feel need to be seen as tough.
- A trusted mediator can unlock the situation and explore common ground

- Need for tenacity/patience
- Role of professionals
- Authority to settle



## Why bother - glorified Settlement meeting?

- Structured form of assisted negotiation
- Parties are heard by a neutral
- Less positional – can discuss strengths and weaknesses confidentially
- Reality testing by a neutral



# Mediation Act 2017

## **1<sup>st</sup> January 2018: before issuing proceedings on behalf of a client all solicitors are required to:**

- Advise the client to consider mediation as a means of attempting to resolve the dispute the subject of the proposed proceedings.
- Provide the client with information in respect of mediation services, including the names and addresses of persons who provide mediation services.
- Provide the client with information about the advantages of resolving the dispute otherwise than by way of the proposed proceedings, and the benefits of mediation.

- Advise the client that mediation is voluntary and may not be an appropriate means of resolving the dispute where the safety of the client and/or their children is at risk.
- Inform the client of the matters concerning confidentiality and enforceability of mediation settlements as set out in the Act.
- Inform the client of the obligation on the solicitor to provide a statutory declaration that the client has been advised of the above and the effect of the non-provision of such declaration.

# A Guide to Good Professional Conduct for Solicitors, 3rd Edition, October 2013

## Litigation, Arbitration and Mediation

- In addition to litigation, solicitors should familiarise themselves with other methods of dispute resolution, such as mediation and arbitration. Solicitors are encouraged to recommend their use to clients where appropriate.
- The solicitor should not, without good reason, characterise a suggestion of mediation or settlement by an opposing party as a sign of weakness. Initiating or engaging in settlement discussions where appropriate, whether through mediation or otherwise, is consistent with effective and zealous representation.



# STATUTORY DECLARATION

- Prior to issuing proceedings, a Statutory Declaration must be made by the solicitor evidencing that the solicitor has performed the obligations imposed under the Act.
- The Statutory Declaration must be filed at the time of issuing proceedings.
- Where a Statutory Declaration has not been completed, the Court “shall adjourn the proceedings” pending compliance.



# ROLE OF THE COURT

- Part 4 of the Act deals with the role of the Court in mediation. Section 16 provides that a Court may, on the application of a party or on its own motion, invite the parties to consider mediation and provide the parties with information about the benefits of mediation.

## Factors considered by court, include:

- conduct of the litigation
- stage of the proceedings
- potential effect of an adjournment on the proceedings
- likely success of the mediation
- bona fides of the application (disingenuous – e.g. *Danske Bank v SC*)



## Where the parties decide to engage in mediation the Court may:

- Adjourn the proceedings;
- Make an Order extending the time for compliance by a party with Rules of Court or with any Order of the Court; or
- Make such other Order or direction as is necessary to facilitate the effective use of Mediation.
- These statutory rights are conferred without prejudice to any other discretionary power which the Court may exercise with a view to facilitating the resolution of a dispute.

# Statute of Limitations

## Section 18 - Extension of limitation period:

“... the period beginning on the day on which an agreement to mediate is signed and ending on the day which is 30 days after either –

(A) mediation settlement is signed by the parties and the mediator, or

(B) the mediation is terminated,

whichever first occurs, shall be disregarded”

# Costs sanctions

## Section 21

“... A court may, where it considers it just, have regard to:

(a) Any unreasonable refusal or failure by a party to the proceedings to consider using mediation, and

(B) Any unreasonable refusal or failure by a party to the proceedings to attend mediation

following an invitation to do so under section 16(1)

## Getting the best from a mediation

- When choosing a mediator, check track record and suitability
- A different mediator's character and style may better suit your client's needs.

## Getting the best from a mediation

- Understand the mediation process is different to any legal process
- Understand the dynamics within each team, particularly the pressures and problems for experts and consultants, and keep focus on achieving a commercial settlement

## Getting the best from a mediation

- Asserting or defending a client's best case may not produce the best commercial solution for that client.
- Agree tactics for the mediation but be reactive and flexible to developments.
- A prior risk analysis may need adjustment during the mediation.

## Getting the best from a mediation

- Have a strategy for using waiting time in the mediation usefully and creatively, reassessing risk analyses or testing alternative solutions.



## Some Advantages to Remote Mediation

- Avoids venue costs
- More flexible timing
- Eliminates travel
- Use of downtime
- Increased availability of lawyers and clients



## Some Disadvantages

- Not face-to-face
- “Victim impact”
- Nuances may be missed
- Technology if unreliable
- Can drag on longer
- Loss of hallway conversations

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# Thank you

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# Getting Your House in Order - Wills and Enduring Powers of Attorney

Owen Burke TEP CTA

12<sup>th</sup> May 2022





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# Wills

# Why should I make a Will?

- You decide who benefits
- Provision for special needs of family members
- Tax planning
- Appointing guardians of children
- Setting up a trust

# What happens if I don't make a Will?

- Spouse and no children
  - Surviving spouse gets 100%
  
- Spouse and children
  - Spouse gets  $\frac{2}{3}^{\text{rd}}$ , children get  $\frac{1}{3}^{\text{rd}}$
  
- No spouse, no children, no parents
  - Siblings share equally

# Certain types of property

- Joint Property
  - i. joint tenancy
  - ii. tenancy in common
- Nominated property
- Shareholders' Agreements
- Life assurance / keyman insurance policies
- Foreign property

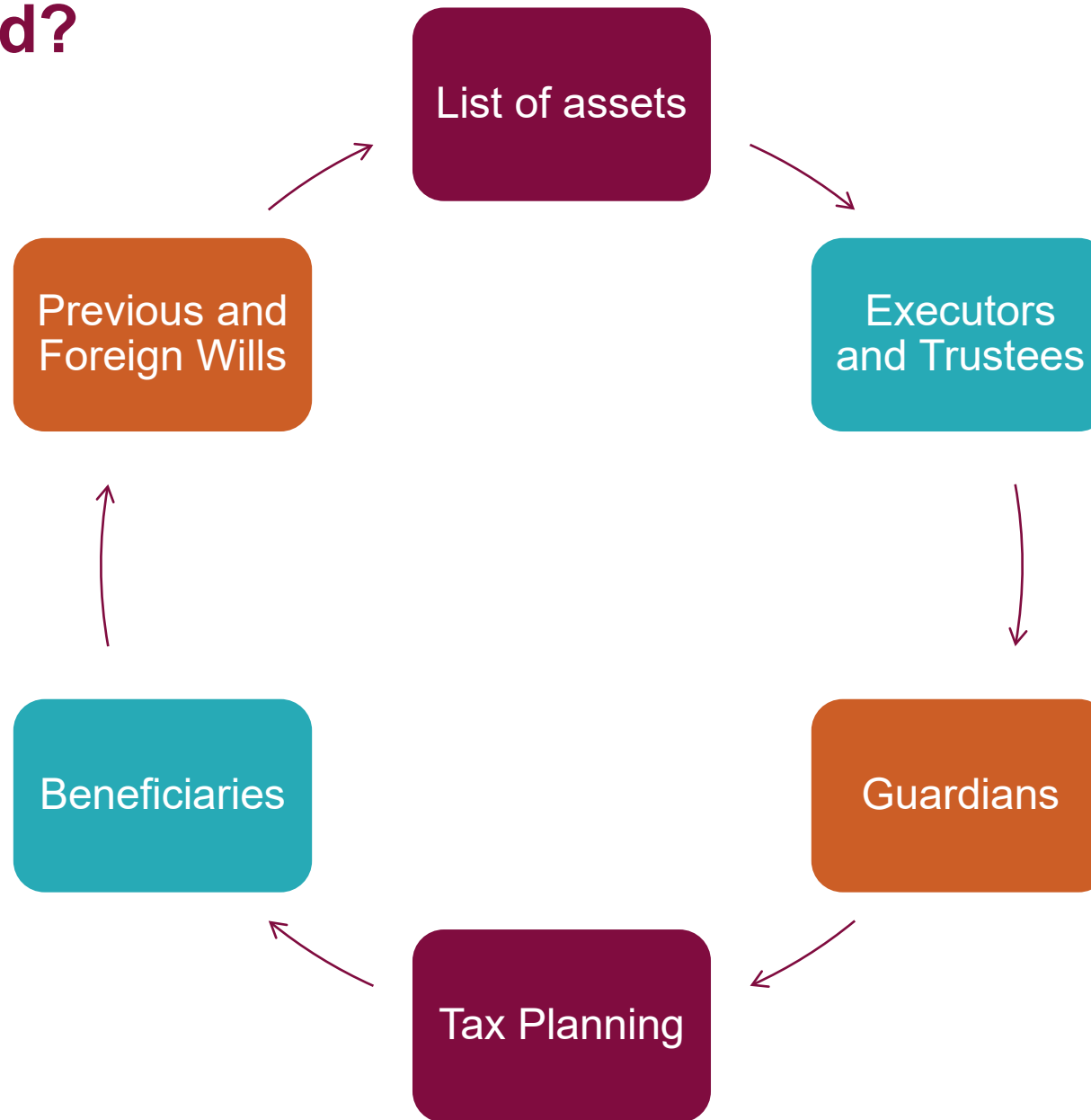


# Legal Requirements

- Aged 18
- Be of “sound disposing mind”
- In writing
- 2 independent witnesses – cannot be a beneficiary or their spouse
- Subsequent marriage revokes a Will (but not Divorce)



# What is involved?



# Executors

- Should appoint 2
- Age of Executors
- Can be a beneficiary

## Role

- Value assets
- Pay expenses
- Extract Probate
- Distribute Estate



# Trustees

- Fixed Trusts
- Discretionary Trusts

## Reasons

- Minor beneficiaries
- Disability
- Improvidence
- Must have 2 where land or real property involved

# Will Challenges

- Undue Influence
- Lack of Capacity
- Improper Execution
- Spouse
- Children

# Spouses

## Legal Right Share

- Testator has no children = half of estate
- Testator has children = one third of estate
- Spouse can claim house as part of share

# Separation and Divorce

- Former spouse may be entitled to share of estate
- Second partner has no legal rights of succession
- Second partner is a stranger for tax purposes
- Qualified co-habitants

# Children

- Marital, non-marital and adopted
- Predeceased children leaving grandchildren
- Advancement
- Section 117 claims – failure of “moral duty”





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# Enduring Powers of Attorney

# Creation

- Donor signs when competent
- Solicitor's Certificate
- Doctor's Certificate
- Notice Parties

# Attorneys

- Attorneys – jointly or jointly and severally
- Scope of Authority
- Attorneys for business matters
- Attorneys for personal matters

# Registration

- Doctor's Certificate – “no longer capable of managing affairs”
- Notice of Intention to Apply for Registration
- Notice Parties can object
- Certificate of Registration



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# Assisted Decision Making (Capacity) Act 2015

# Five types of arrangements

Enduring Power of Attorney

Advance Healthcare Directive

Decision-making Assistant

Co-Decision Maker

Decision-Making Representative

# Capacity

- Presumption of Capacity
- Functional Test for Capacity
  - - Issue Specific
  - - Time Specific

# Decision-Making Assistant (DMA)

- Appointed by the relevant person
- Function
  - - help obtain information
  - - explain information
  - - communicate decision
- Relevant person still makes the decision



# Co-Decision Maker (CDM)

- Appointed by the relevant person
- Make specified decisions jointly
- Formally registered with Decision Support Service
- Capacity statements required

# Decision-Making Representative (DMR)

- Appointed by Court
- Decision-Making Representative Order
- Registered with Decision Support Service
- Annual reporting requirements



## Owen Burke

Senior Associate Solicitor  
Trust and Estate Practitioner  
Chartered Tax Adviser

About

- “I also wanted to say how impressed I have been with Owen Burke who has been handling my Mum's Estate ...
- He has been a great professional and a really nice person to deal with. ”

- Client of Hayes

[www.hayes-solicitors.ie](http://www.hayes-solicitors.ie)

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# Thank you

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