

Attorneys, Executors & Administrators

Attorneys – appointed by a living person to make decisions during the grantor's lifetime

Executors – appointed by a Will to make decisions post death

Administrators – appointed by tribunal or Court to make decisions in lieu of an attorney or executor (or as a trustee in bankruptcy)

Legal Personal Representative ("LPR")

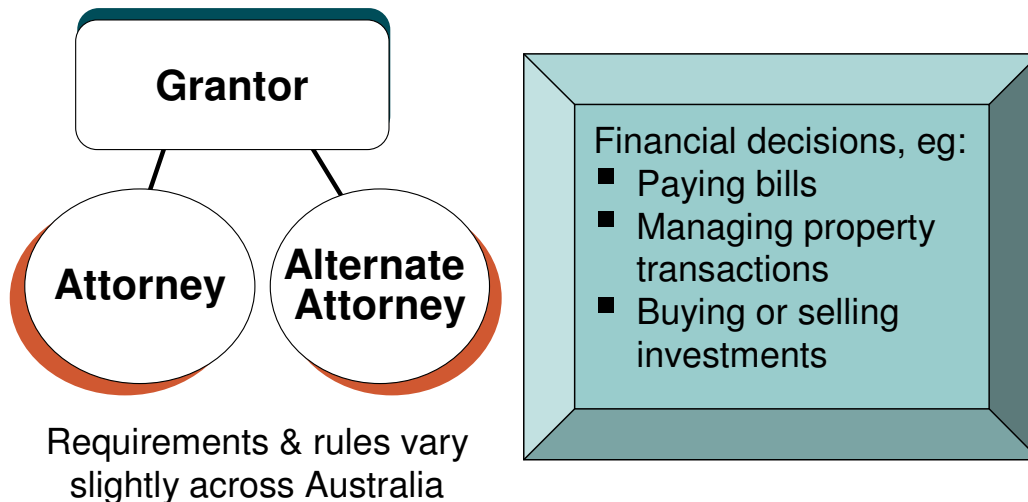
Subject to the terms of appointment, eg the holder of a financial enduring power of attorney that is only empowered to act if the grantor has lost decision making capacity, the attorney, executor or administrator acts as the grantor's legal personal representative. The extent of the LPR's powers to act depend on both the terms of the document governing the appointment and the document governing the beneficial ownership of the assets owned or controlled by the grantor in .

Governing Documents

In Australia, there are a range of governing documents for LPRs, including:

- A Will or letters of administration (as to estate assets only).
- The terms of appointment as administrator for a living person (personally owned assets only).
- The trust Deed for an externally managed or self superannuation fund (in the case of the latter there may be no prohibition against acting in a self interested manner).
- A binding death benefit nomination (to the extent that it has not lapsed or is not subsequently overridden by a subsequent amendment to the governing Deed).
- The trust Deed for a family or hybrid trust (the Deed will usually take precedence over the Will and the LPR usually has much wider discretionary powers than those expressed in the Will, with no prohibition from acting in a self interested manner).
- A company constitution and share certificates for shares with tailored or flexible entitlements, eg dividend access shares.
- Enduring financial, medical treatment and guardianship powers of attorney, all of which lapse on death.
- General powers of attorney (that lapse on the grantor's loss of decision making incapacity, as well as on death).

Financial Enduring Power of Attorney



Why prepare a Financial Enduring Power of Attorney (“EPA”)?

If the grantor subsequently loses decision making capacity, a financial EPA gives the nominated attorney/s the authority to administer the grantor’s financial affairs. If the grantor does not have a valid financial EPA in place, an application can be made for an administrator can be appointed by the relevant authority, eg to the Guardianship List at the Victorian Civil and Administrative Tribunal (“VCAT”).

How many people can be appointed?

One or more persons as immediate attorneys, and one alternate attorney in the same document (who is to act if the first appointed attorney(s) are unable to do so). It is necessary to prepare 2 separate documents to have 2 or more alternates.

How long is it effective?

A financial EPA is operative from the time of commencement and continues if the grantor subsequently loses decision making capacity. The power will end if the:

- Grantor revokes it – this can be done at any time the grantor still has capacity;
- Grantor dies;
- Grantor executes a subsequent EPA that is inconsistent with the current EPA;
- Attorney resigns;
- Attorney is unable to act due to incapacity, death, bankruptcy or insolvency; or
- Relevant authority for represented persons, eg VCAT, revokes the appointment.

Form and Execution (note some variation between States)

There are specific requirements prescribed by the relevant legislation regarding the form of the document, acceptance by the attorneys and the witnessing requirements that must be met in order for the document to be valid, eg in Victoria one of the two witnesses must be authorised to witness statutory declarations.

Tailoring a Financial EPA

Grantor can specify

Conditions, eg

- Specific assets only
- Certain assets not be sold/mortgaged
- Attorney can/cannot confirm super fund binding death benefit nominations

Commencement

- Immediately;
- Loss of capacity;
- Limited to specific time, eg during overseas travel

2+ attorneys

- Must specify how they act, eg
- Together
 - Independently

Requirements of the Attorney(s)

The attorney(s) must:

- Be at least 18 years of age;
- Have decision making capacity (this includes not being an undischarged bankrupt);
- Sign to indicate their acceptance of the role;
- Keep records of dealings made when acting pursuant to the power;
- Avoid conflicts of interest;
- Be someone trusted by the grantor to act in the grantor's best interests; and
- Be capable of handling financial matters.

Limitations of Financial EPAs

Limitations include not being to make a Will on behalf of the grantor or to take over a directorship without specific approval by the shareholders of the relevant company.

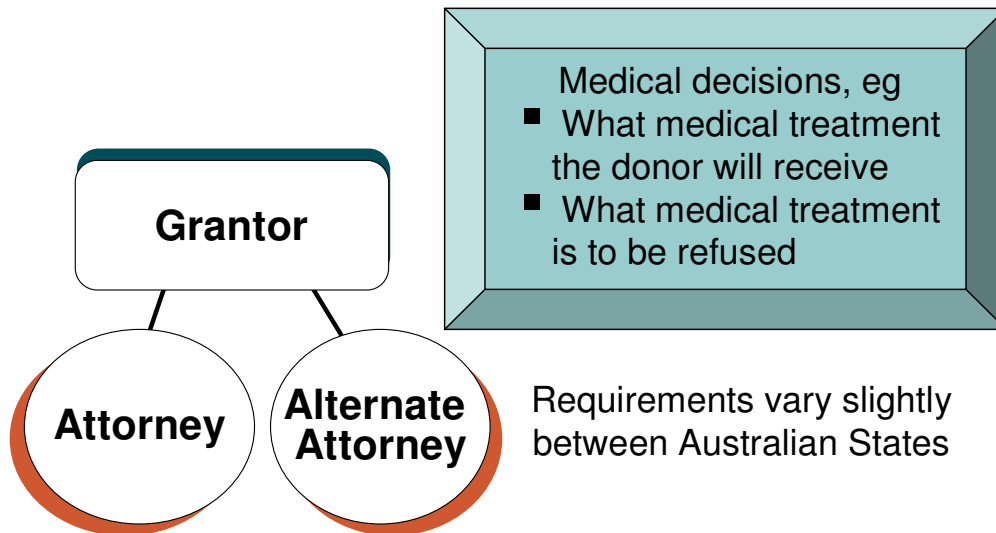
Misuse

If anyone with an interest in the grantor's welfare has concerns that the attorney is not acting in the grantor's best interests, they can apply to the relevant authority, eg VCAT, to have the attorney removed or replaced. The relevant authority may also issue sanctions against an attorney who is not acting in the grantor's best interests.

Other types of Powers of Attorney

General Power of Attorney – as with the financial EPA, this document deals with financial matters but ceases to operate if the grantor loses capacity. # Enduring Medical Treatment Power of Attorney. # Advanced Health Directive (Qld). # Lifestyle Decisions EPA, eg Enduring Guardianship.

Medical Treatment Power of Attorney



Why prepare a Medical Treatment Enduring Power of Attorney (“EPA”)?

If there is any debate as to who has the authority to make medical decisions on a grantor’s behalf if the grantor is incapable of doing so, this power confers this authority to the agent the grantor has appointed. # To appoint someone who can refuse treatment on the grantor’s behalf if the grantor is incapable of making this decision. # To appoint someone who has an understanding of the grantor’s views and beliefs and the extent to which they may influence the medical treatment the grantor would wish to receive.

How many people can be appointed?

Under this instrument one person can be appointed as the initial agent, and a second person as the alternate agent who is only to act if the first is unable to do so.

When does it commence?

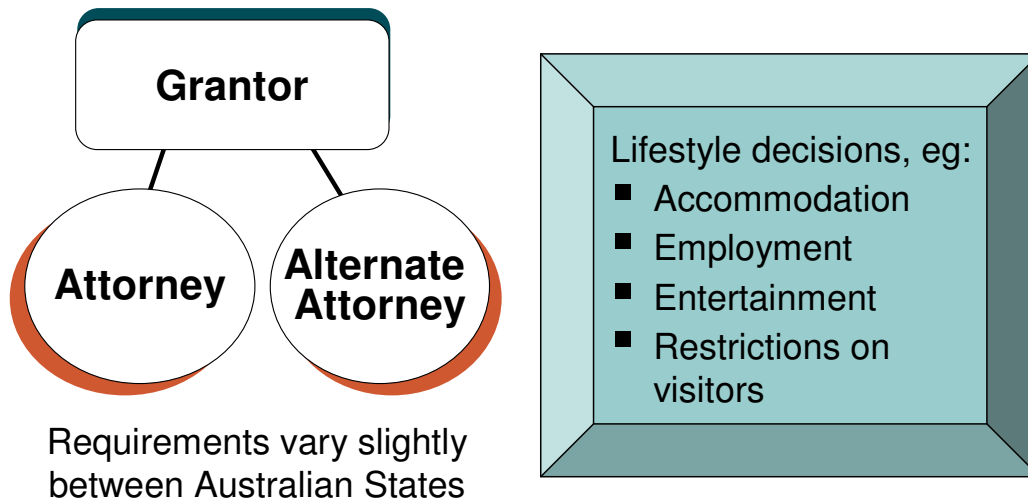
The power is only operative if the grantor has become incompetent.

When will it end?

The power will end or cannot be used if the:

- Grantor regains capacity;
- Grantor revokes the medical treatment EPA;
- Grantor makes a subsequent Medical Treatment EPA;
- Agent and the alternate agent (if any) are unable to act due to incapacity or death; or
- Relevant authority, eg the Guardianship List at the Victorian Civil and Administrative Tribunal (“VCAT”) revokes the power.

Enduring Power of Guardianship



Why prepare an Appointment of Enduring Guardian?

- If there is any debate as to who has the authority to make lifestyle decisions on the grantor's behalf, this power confers this authority to the person the grantor has appointed.
- To appoint someone who has an understanding of the grantor's views and beliefs and the extent to which they may influence the grantor's lifestyle decisions.

It is usually preferable for the grantor to remove any ambiguity in decision making by appointing the same person(s) under this document as is appointed the medical treatment enduring power of attorney. Some people choose different financial attorneys, eg because of business considerations – if this is the case the grantor should be confident that the different attorneys will work well together.

How many people can be appointed?

One person can be appointed as the initial guardian and a second person as the alternative guardian, who is to act if the initial guardian is unable to act.

When does it commence?

The power is only operative if the grantor has become incapable of making reasonable judgments regarding the matters specified in the Appointment of Enduring Guardian due to disability. There are specific requirements prescribed by the relevant legislation regarding the form of the document, acceptance and the witnessing requirements that must be met for the document to be valid. In Victoria, one of the two witnesses must be authorised to witness statutory declarations.

When will it end?

The power will end or cannot be used if the grantor regains capacity, revokes the instrument or makes a subsequent Appointment of Enduring Guardian or the guardian and alternative guardian (if any) are unable to act due to incapacity or death or the relevant statutory authority, eg VCAT in Victoria, revokes the power.

Wills – Roles & Limitations

A Will only deals with Willmaker's **personally owned** assets and assets paid to the estate

A Will can adjust for **non-estate assets**, eg super

The Will needs to cover:

- * Administration of estate & ongoing trusts
- * Division of estate (including adjustments)
- * Extent of executor's discretion/"menu" of options

Progressive and ongoing changes to the way personal, investment and business wealth is owned and taxed in Australia have changed the level of importance given to Wills.

What is a Will?

A Will is a legal document in which a person sets out how and to whom the person's personally owned assets (including assets paid to the estate in consequence of death) are to be distributed after death, the manner in which the deceased estate is to be administered and the powers that the executors have to do so are set out in the terms of the Will. It remains an important part of the implementation of estate planning for most people.

Each Australian State and Territory has also enacted legislation governing trustees that confers powers on the executors appointed by the terms of the Will. By virtue of being the deceased's legal personal representatives, the executors are charged with administration of the Willmaker's estate, but may also gain personal control of non-estate assets, eg self managed superannuation funds and family and hybrid trusts.

Validity of a Will

Generally speaking, in order to be valid, a Will:

- Can only be made by a person with sufficient decision making capacity who is **over 18** years of age, or who is under 18 years of age but who is legally married;
- Must be in **writing**; and
- Must be executed by the Willmaker in the presence of at least 2 adult **witnesses**.

A Will can set out not only who is to inherit personally owned assets, but also **how** a person is to inherit those assets.

Limitations of Mutual Wills

Wills can be:

- Sole or unilateral/non-mirrored
- Mirror (ie with the same, or substantially the same, terms as spouse or other person)
- “Mutual” (ie made on the basis that another person, eg spouse, will not change their Will)
- Mutual Wills often thwarted by joint tenancies, binding death benefit nominations, SMSF membership & control of family/hybrid trusts

Limitations of Mutual Wills

A major problem with entering into a “mutual” Will in Australia is the limitation of the scope of an Australian Will. Too many assets fall outside the scope of assets that are subject to the terms of a Will to make such an agreement readily enforceable. Among the “non-estate” assets are:

- Assets owned as joint tenants (see next slide) – they form part of the estate of the surviving joint tenant, rather than the estate of the first to die of the joint tenant;
- Superannuation death benefits that are not paid as a lump sum death benefit to the legal personal representative of the Willmaker, but instead are paid as to a lump sum or pension dependant;
- Unallocated assets of a family or hybrid trust; and
- Dividend access shares (usually with no voting rights) in a family company.

The decision about what happens to assets in a self managed superannuation fund or family or hybrid trust is often made independently of the Willmaker, eg by:

- The surviving member or members of the self managed superannuation fund;
- (Effectively) the appointor of the family trust selecting the new trustee of the family trust; or
- The voting unitholders of a hybrid trust.

There is considerable doubt whether a Willmaker “directions” in the Will regarding the administration of a self managed superannuation fund (assuming that the decision regarding death benefits has not already been made by surviving members) or a family or hybrid trust are enforceable in preference to the trust Deeds governing the fund or trust.

One area where mutual Wills have been used is in conjunction with restricted account based pensions – see the Superannuation Pensions Pocket Summary.

Appointment of Executors & Estate Administrators

- By a Will to administer a deceased estate
- By a Court to administer a deceased estate & subject to the terms of the Will, eg because the nominated executor is unable or unwilling
- By a Court to administer a deceased estate & subject to the laws of intestacy

Executors & administrators must act in the best interests of the estate beneficiaries & are personally liable for failing to meet their responsibilities – they may also continue to act as ongoing trustees under the terms of the Will

Duties of the Executor or Executors in Australia (1st of 3 pages of notes)

1. Locating the Will

The original Will (appointing one or more executors) must be found; eg amongst the deceased's papers, at the bank or with the lawyer. Once the Will is located, the executor usually engages a lawyer to assist in the administration of the estate, but is not obliged to consult the lawyer who prepared the Will about the administration of the estate. (One or more executors may be appointed by the Will – Court direction may need to be sought to resolve any differences between executors.)

2. The Funeral

It is the executor's responsibility to make the funeral arrangements and must consider, but not necessarily, follow any wishes of the Willmaker, eg as set out in the Will. Funeral expenses are the first claim on the estate, provided the expenses are not extravagant.

3. Location of Assets

The executor should locate all the assets of the deceased. The executor can write to banks and investment organisations requesting particulars of accounts and documents held on behalf of the deceased and the requirements for their release.

4. Protecting the Assets

Once documents and assets are located the executor will need to make arrangements to collect and preserve the assets. The executor should ensure that the house and its contents are secure and covered by insurance. Appropriate decisions concerning the care of pets must also be made.

Business assets must also be preserved, even to the extent of taking over the running of a business. An executor may need to seek the assistance of the deceased's accountant or senior employees in making decisions about the operation of the business. The executor may need to apply to the Court for an urgent order to assume control of the deceased's business interests.

Appointment of Administrators for Living People

- By an enduring or other power of attorney
- By a statutory body to administer finances for a person lacking adequate decision making capacity
- As a trustee in bankruptcy (to act on behalf of creditors)

Administrators must act in the best interests of the represented person (or creditors, in the case of trustees in bankruptcy) and are personally liable for failing to meet their responsibilities

Duties of the Executor in Australia – 5. Grant of Probate to the Executor

An executor is given the right to administer the estate through the Will and a Grant of Probate is the formal evidence of this right. An executor may commence administering parts of the estate before obtaining a Grant of Probate. Depending on the nature and value of the assets, it can be possible to take possession of assets and distribute them to beneficiaries without a formal Grant of Probate. This depends on the nature and value of the assets.

The executor applies to the Supreme Court for a Grant of Probate. When granted, the executor has authority to collect the assets of the estate. Once collected, the assets are recorded in an estate inventory. This inventory is prepared from bank books, bank statements, share certificates, insurance policies, land titles, accounts and other records. Superannuation and life insurance death benefits and net assets in a family trust only form part of that inventory if they are paid to the estate.

Refusing the Role of Executor

An executor may relinquish the role, but needs to do so formally. An executor may indicate to other executors that he or she will not take an active part in the administration but reserves the right to be involved at a future time. If there is no executor willing to act, then the principal beneficiary usually steps in and applies to administer the Will under “Letters of Administration” (which are obtained from the Supreme Court).

6. Taxation

The executor usually must lodge an income tax return on behalf of the deceased up to the date of death and then on behalf of the estate from the date of death until the administration of the estate is completed. An executor can have a registered tax agent prepare the tax returns. The executor must ensure that all tax liabilities related to the deceased and the estate are paid in full, including any GST and capital gains tax.

Executors & Professional Advisors

Appointment of an executor **may** mean

- High fees for administration of estate – these can often be negotiated and set out in the Will or other document
- Loss of ongoing income, eg a lawyer or trustee company may choose to use their own firm for financial services
- Opportunity for family member to personally benefit from non-estate powers, eg as trustee of SMSF or family trust
- Responsibility for key tax decisions, eg family home, sale of small business
- **Personal liability**, but no professional indemnity insurance, eg for many accountants and financial advisors

Duties of the Executor in Australia – 7. Distribution of the Estate

When the assets are in the possession of the executor and all debts and expenses have been paid, the executor may then distribute the assets of the estate in accordance with the terms of the Will. Some assets are distributed in cash, others such as furniture or motor vehicles in kind, whilst real estate is transferred to the beneficiary's name. Where children under the age of 18 years are involved, assets are generally held in trust until they are able to manage their own affairs.

8. Final Accounts

As the administration draws to a close, the executor should prepare a final account for the estate's assets, liabilities, income and expenditure and present this to those who have an interest in the estate.

9. Executor's Commission, Fees and Costs

An executor may be entitled to receive a commission (or charge fees in lieu of a commission) depending on the size of the estate and the responsibilities of its administration. The commission or fee might be set out in the Will, agreed to by the beneficiaries or approved by the Court. Calculation of the appropriate commission or fee can be complex and may be in the range of 1.5% to 5% of the estate's value.

In addition to the executor's commission or fee, the executor will be allowed the costs of engaging a lawyer, an accountant, a financial advisor and other professionals to advise and assist in the administration of the estate. Lawyer's costs are regarded as testamentary and administrative expenses and are charged by agreement with the executor or under a scale of costs approved by the Court.

10. Self Managed Superannuation Funds ("SMSFs") and Family Trusts

By virtue of being the deceased's legal personal representative, the executor may also assume roles of trustee in respect of SMSFs (for which a fee cannot be charged) and of trustee or appointor in respect of family and other non-fixed trusts. It is important to note that the governing document for those roles will usually be the terms of the respective trust Deeds, rather than the terms of the Will.

Attorneys, Executors & Administrators – Further Reading

**Australian Master Estate
Planning & Succession
Guide – Chapter 5 & 39**

**You Can't Take It
With You –
Chapter 5 & 16**

The latest version of this Pocket Summary is at
www.mooreslegal.com.au/services/epss/pocket-summaries

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Further Reading

- The 1st edition of the **Australian Master Estate Planning and Succession Guide** by Allan Swan is scheduled to be published by **CCH** in 2011.
- The 1st edition of **You Can't Take It With You** by Andrew Simpson was published by **Wrightbooks** in 2009.
- The 5th edition of **Tax Issues in Family Law Property Settlements** – The Difference Between Hacking and Carving by Peter Szabo was published by **MOORESLEGAL** in 2008.

About the Author of the Pocket Summaries – Allan Swan

In addition to his main role as a principal of the **MOORESLEGAL** estate planning team (working in the areas of **Asset Protection, Trusts, Superannuation, Tax and Estate Planning**) Allan is also the principal of **APTSTEP**, a provider of training and materials. Allan's current presentation topics are:

- Asset Protection Planning (includes page 10 of this Pocket Summary)
- Blended Families (1 & 6-7)
- Business Structures Overview
- Estate Planning – Key Cases and Rulings
- Estate Planning – Practical Case Studies for 2010
- Estate Planning – Tax and Strategic Issues (all pages)
- Funding Estate Planning
- Ruling from the Grave (2-3 & 6-7)
- SMSFs – Planning Issues (2-3 & 6)
- Superannuation Death Benefits (2-3, 6 & 8-10)
- Superannuation Overview (2-3)
- Testamentary Trusts (6)
- Trusts – Income and Capital Distributions
- Trusts – The A-Z.

Contact Allan 03 9843 2153 for further information regarding on the content of the topics, the fees charged and to schedule a presentation, workshop or seminar.