

Legal Personal Representatives

Executors – appointed by a Will to make decisions post death

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

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.

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 managed 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 and directives, all of which lapse on death.
- General powers of attorney (that lapse on the grantor's loss of decision making capacity, as well as on death).

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 to act
- By a Court to administer a deceased estate & subject to the laws of intestacy

Executors & administrators must act in the best interests of the deceased 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

Appointment of Executors

The selection of a first choice executor or executors is usually made from:

- beneficiaries, eg a domestic partner receiving all or most of the estate assets may also be the first choice executor;
- close relatives or friends who are not also beneficiaries, eg the aunts, uncles or grandparents of the beneficiaries;
- professional advisors, eg legal practitioners; or
- professional trustee companies.

Executors are personally liable for all expenses incurred on behalf of the deceased estate and any reimbursement of their costs and expenses is limited to the assets of the deceased estate. Executors are also personally liable should they be negligent in the administration of the deceased estate

Checklist – Duties of the Executor or Executors in Australia

1. Locating the Will.
2. Funeral arrangements for the deceased.
3. Locating the assets of the deceased.
4. Protecting the assets, eg maintaining general insurance policies.
5. Obtaining a grant of probate for the Will.
6. Assuming non-estate responsibilities, eg in relation to self managed superannuation funds or family trusts.
7. Estate administration – this can last for a matter of months (where all beneficiaries are adults) to many years (where there are ongoing trusts, eg life interests, trusts for young children).
8. Taxation returns, eg income tax and GST.
9. Distribution of the assets of the deceased estate.
10. Preparation of final accounts for the deceased estate.

Wills – Roles & Limitations

Only deal with willmaker's personally owned assets and assets paid into the deceased estate

Often establish trusts for beneficiaries

Not able to deal directly with

- Assets with a surviving joint tenant
- Super paid directly to dependants
- Family trusts

See notes re
limitations of
Mutual Wills

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:

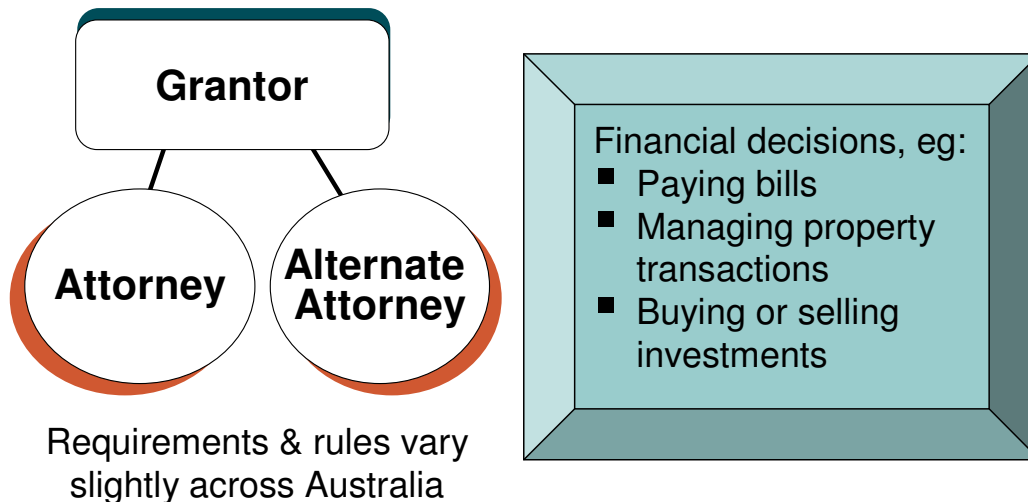
- Assets owned as joint tenants – they form part of the deceased estate of the surviving joint tenant, rather than the deceased estate of the first to die of the joint tenants;
- Superannuation death benefits that are not paid as a lump sum death benefit to the legal personal representative of the Willmaker, but instead are paid directly to a 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 trustee or director of the self managed superannuation fund;
- Appointor of the family trust (ie selecting a new trustee of the family trust); or
- Voting unitholders of a hybrid trust.

A Willmaker's purported “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 trustees or directors) or a family or hybrid trust are usually subordinate to the terms of the trust Deed or Will governing the fund or trust. There is also an important restriction regarding enforcing an agreement to have mutual Wills – any redress excludes specific performance of the mutual Wills agreement and instead is limited to just damages.

Enduring Financial Power of Attorney



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

If the grantor subsequently loses decision making capacity, an Australian 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 to be appointed by the relevant authority, eg to the Guardianship List at the Victorian Civil and Administrative Tribunal (“VCAT”).

One or more persons can be appointed as a first choice financial attorney. One or more alternate or reserve attorneys can also be appointed. A financial attorney is not able to make a Will and needs shareholder approval to become a director.

Duration

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 if the grantor still has capacity;
- Grantor dies or the attorney resigns;
- Grantor executes a subsequent EPA that is inconsistent with the current EPA;
- Attorney is unable to act due to incapacity, death, bankruptcy or insolvency; or
- Relevant authority for represented persons, eg QCAT, revokes the appointment, eg having received a complaint from a 3rd party as to how the attorney is administering the finances of the represented person.

Form and Execution (note some variation between States and Territories)

There are specific legislative requirements 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

Express Powers & Limitations

- Specific assets only
- Certain assets not be sold/mortgaged
- Super fund BDBNs
- Financial support of family member

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 and sign their acceptance of the role;
- Have decision making capacity (this excludes undischarged bankrupts);
- 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.

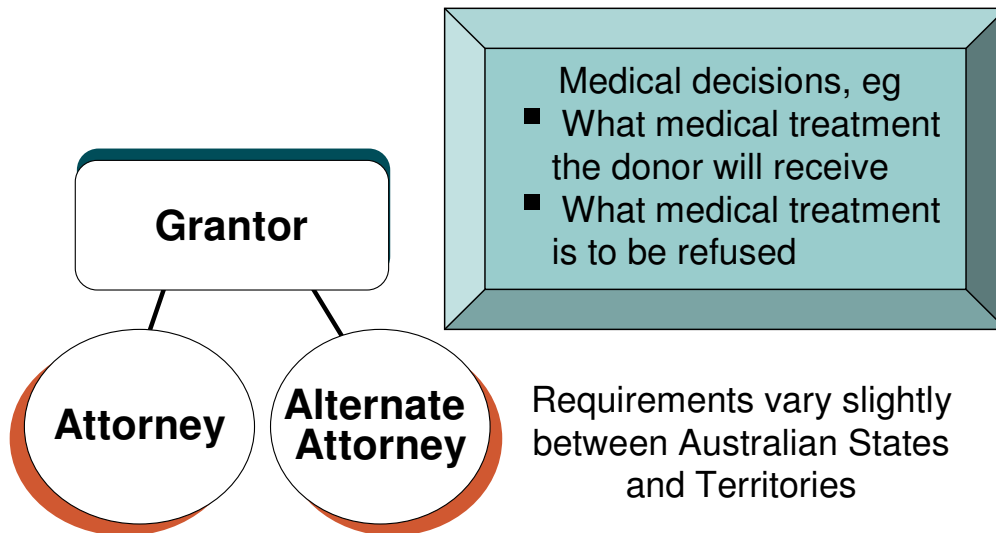
Express Powers and Limitations of Financial EPAs

The grantor can include express powers or limitations in the financial EPA, eg to:

- Confer benefits on the attorney or 3rd parties, eg the use of a family home or payment of expenses of a vulnerable adult child;
- Prohibit the sale or mortgage of particular assets, eg an investment property;
- Make gifts, eg payment of grandchildren's school fees, seasonal presents to friends and family members and gifts to charities;
- Continue to make planned giving donations or tithes, eg to a religious organisation;
- Make, confirm or change a lapsing or other binding death benefit nomination;
- Use the powers and discretion given to the member in respect of an SMSF, eg the attorney may be limited in what percentage of the funds in an SMSF can be withdrawn in a given financial year;
- Use the powers and discretion given to the grantor in respect of a family trust; and
- Via voting shareholding in a private company, indirectly determine the benefits to be received from dividend access shares.

Medical Treatment

Power of Attorney or Directive



Why prepare a Medical Treatment EPA or Directive?

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 of attorney or directive 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?

The rules for this document vary between Australian States and Territories. Usually under this document 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 incapable.

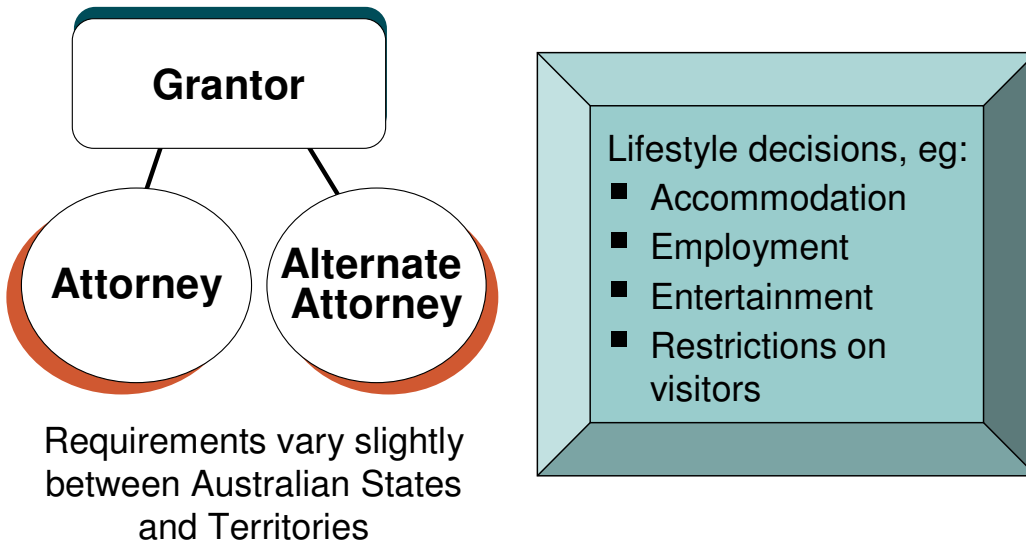
When will it end?

The power will end or cannot be used if the:

- Grantor regains capacity;
- Grantor revokes the document;
- Grantor makes a subsequent Medical Treatment EPA or directive;
- 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 document.

Guardianship

Power of Attorney or Directive



Why prepare a Guardianship, EPA or Directive?

- 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 decisions regarding the grantor's lifestyle.

In States and Territories where this is a separate document to the document covering medical treatment 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 for medical treatment decisions.

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 document due to incapacity. There are specific requirements prescribed by the relevant Australian State or Territory 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 document 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, revoking the power.

Attorneys, Executors & Administrators – Further Reading

**Australian Master Estate
Planning Guide –
Chapters 13 & (in the
Premium Edition) 47**

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

The latest version of this Pocket Summary is at
www.mooreslegal.com.au/services/estateplanning/pocketsummaries

Further Reading

- *Australian Master Estate Planning Guide* – Allan Swan, to be published (in both a Standard and Premium Edition) by CCH in 2012.
- *Estate Planning Documents* – Allan Swan, Moores Legal (includes many of the Pocket Summary series).
- *You Can't Take It With You* – Andrew Simpson, Wrightbooks.
- *Tax Issues in Family Law Property Settlements* – Peter Szabo, Moores Legal.

Australia-wide Seminar, Workshop & other Presentations – Allan Swan

EPSTTAP Introductory: • Estate Planning – The A-Z (includes pages 2-3 & 5 of this Pocket Summary) • SMSFs – The A-Z (4-5) • Trusts – The A-Z (3).

EPSTTAP Advanced: • Estate Planning – Case Studies • Estate Planning Masterclass • Superannuation – Death Benefits & Binding Nominations (3 & 5) • Testamentary Trusts – Drafting the 6 Major Types • Trusts & Deceased Estates – Income & Capital Distributions • AMEPG Chapter Workshops.

Allan's local Moores Legal client, community & discussion group topics are:

- Estate Planning – Protecting & Enhancing Wealth • Estate Planning – Vulnerable Family Members • Family Trusts – Income & Capital Overview • Farm Succession – Avoiding Tax Pitfalls & Anticipating Disputes • Providing an Estate Planning Service for Clients • SMSFs – Instalment Warrants, Pensions & Binding Death Benefit Nominations • Tax & Business Structures Overview • Update – Estate Planning, Superannuation, Trusts, Tax & Asset Protection.

To book Allan for any of these topics, contact Lilian Bruère on 03 9843 2153. All Pocket Summaries are copyright and are for general information purposes only and should not be relied on as (or in substitution for) legal or other professional advice.