

## ENDURING POWERS OF ATTORNEY & APPOINTMENT OF ENDURING GUARDIANS

For many of us there will be a time during our life, due to accident, poor health or advanced age, that we will be unable to make decisions for ourselves.

There is no automatic regime for another person to make decisions for you if you become incapacitated. Making an **Enduring Power of Attorney** and an **Appointment of Enduring Guardian** gives you certainty about who will make decisions for you while you are incapacitated and, on the terms, and conditions you set. Being prepared and having a Power of Attorney and an Enduring Guardian will also alleviate a burden for your family members or carers in obtaining legal authority should you require assistance with managing your affairs in the future. If you do not have an Enduring Power of Attorney and Enduring Guardian, then your family members will need to make an application to the NSW Civil and Administrative Tribunal (NCAT) to have an Attorney and/or Guardian appointed.

### What is the difference between an Enduring Power of Attorney and Appointment of Enduring Guardian, and what are their roles?

#### ENDURING POWER OF ATTORNEY

A Power of Attorney is a legal document by which you can appoint another person or multiple people (referred to as 'attorney/s') to make decisions for you or to act on your behalf, in the event that you lose the ability to make decisions for yourself.

A Power of Attorney authorises an attorney to make decisions for you to manage your **legal and financial affairs**, including buying and selling real estate, shares and other assets, operating your bank accounts and making payments on your behalf.

#### APPOINTMENT OF ENDURING GUARDIAN

An Appointment of Enduring Guardian is a legal document appointing another person or multiple people (referred to as 'guardians') to make decisions for you or to act on your behalf and make decisions about where you might **live** (including a nursing home or remaining in your own home), what **healthcare** you are to receive, what **personal services** you might receive, and providing **consent** for **medical** and **dental procedures**.

You may also include a direction to **withdraw medical intervention** in the event that there is no likelihood of recovery from a serious illness or condition.

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## Who should I appoint as my attorney and guardian?

It is crucial that you appoint someone that you trust. While attorneys and guardians have specific obligations to act in your interest, they will have significant responsibility, so it is important that you appoint someone who is trustworthy, reliable and sensitive to your wishes.

You can appoint more than one attorney and/or guardian. You can specify whether these attorneys must act together or whether they may act individually. Alternatively, you could appoint one person as your primary attorney/guardian and another person as a back-up attorney/guardian in case the primary attorney/guardian is unable to act.

## How can I make an Enduring Power of Attorney or Appointment of Enduring Guardian?

To be valid, an Enduring Power of Attorney and Enduring Guardian must use the prescribed legal forms and be signed and witnessed according to legislative requirements.

As each State and Territory has its own rules and prescribed forms relating to Enduring Powers of Attorney and Appointment of Enduring Guardian, it is important that you use the correct document for NSW.

## What about capacity?

To make an Enduring Power of Attorney and Appointment of Enduring Guardian, you need to be over 18 and have the capacity to understand the nature and effect of making an Enduring Power of Attorney and Appointment of Enduring Guardian.

If a person lacks the capacity to make an Enduring Power of Attorney and an Appointment of Enduring Guardian, it may be appropriate for a family member or friend to apply for a Guardianship and/ or Financial Management Order from the NSW Civil and Administrative Tribunal (NCAT) instead.

## How can our team help?

Our Wills & Estates Team can guide you through the process of making an Enduring Power of Attorney and Appointment of Enduring Guardian. We will clearly explain your options, offer practical advice and ensure your Enduring Power of Attorney and Appointment of Enduring Guardian complies with all relevant legal requirements. We are also able to advise attorneys and guardians on their responsibilities and assist with Guardianship and Management applications to NCAT.

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## TESTAMENTARY TRUSTS

### What is a testamentary trust?

A testamentary trust is a discretionary trust set up in your Will. Creating a testamentary trust in your Will can have significant advantages for your beneficiaries rather than giving them an outright gift in a standard Will.

Under a standard Will without testamentary trusts, a beneficiary receives their inheritance directly into their own hands. It is up to the beneficiary to decide how that money is invested or spent. The beneficiary will pay income tax on any investment income earned by the inheritance at his or her marginal tax rate. The inheritance forms part of the beneficiary's pool of personal assets which are available for distribution in the event of relationship breakdown or insolvency.

By contrast, a testamentary trust involves a trustee holding the inheritance on trust for a number of potential beneficiaries, usually family members or related entities, who are identified in the Will. Depending on your objectives, the trustee may be the principal beneficiary (e.g. your child) or a trusted independent person (e.g. your accountant or a friend). The trustee has the discretion to regularly distribute the income and capital of the trust between the potential beneficiaries in accordance with the terms of the Trust.

### What are the advantages of testamentary trusts?

#### ***Protection from Divorce***

If a beneficiary (say, your child) separates and is involved in family law property proceedings, a testamentary trust can keep your child's inheritance separate from his or her personal assets and can quarantine it from a claim by the separated spouse. In this way, your estate is for the benefit of your direct descendants, rather than potentially being divided in a family law dispute. If you are particularly concerned about relationship breakdown in the next generation, we can customise a testamentary trust to provide the maximum protection for your beneficiaries.

#### ***Protection from Bankruptcy***

Asset protection is a growing concern as more people become involved in financial activities (such as giving guarantees for business or borrowing to invest) or are involved in a profession that may expose them to liability. A properly designed testamentary trust can provide important protection for your intended beneficiaries. The assets within the testamentary trust are segregated from a beneficiary's personal assets and can be protected if a beneficiary gets into financial difficulties or becomes bankrupt.

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## **Tax Planning Opportunities**

A testamentary trust provides considerable opportunities to minimise the tax that would otherwise be payable by your beneficiaries. A testamentary trust enables the trustee to distribute income between your nominated beneficiaries in such a way as to manage the total income tax payable by the group.

The particular benefit of a testamentary trust, as opposed to trusts set up during a person's lifetime, is the treatment of tax on income distributed to minors. Where minor children receive income from the original assets of a testamentary trust, they are taxed on that income as adults and enjoy an adult's tax-free threshold. The tax-free threshold for an adult is \$18,200.00, so the potential tax savings where income is distributed to minors from a testamentary trust are significant.

Once established, it is possible for additional funds, outside your estate to be paid into the Testamentary Trust. However, income distributed to minor beneficiaries which is derived from additional funds contributed will be taxed at adult marginal rates.

## **An Illustration**

Your total estate is worth \$1.2m. You wish to divide your estate equally between your two children, meaning that they will each receive an inheritance of \$600,000.

Your son, Bill, earns a salary of \$135,000 and has three young children. Bill plans to invest his inheritance in a mixture of shares and term deposits. Bill's financial advisor tells him he can expect an investment return of 8% being an annual investment income of \$48,000.

If Bill receives his inheritance directly under a standard Will, the investment income is added to Bill's salary and Bill will be liable to pay 37% tax on any income earned on the inheritance (approximately \$17,760).

Alternatively, if your Will creates a testamentary trust controlled by Bill, he will be able to distribute the investment income between his three children as follows:

Beneficiary	Income	Tax
Child 1	\$16,000	\$ Nil
Child 2	\$16,000	\$ Nil
Child 3	\$16,000	\$ Nil
Total		\$ Nil

This amounts to a tax saving of \$17,760 for Bill and his family each financial year.

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*Note: these tax calculations are based on rates effective as at 1 July 2025. Medicare and levies have not been considered for these purposes. Please note that the above is an example only and that you should consult a financial planner or taxation specialist for advice about your particular circumstances).*

## **What are my options?**

The terms of the testamentary trust can be tailored to suit your goals and the needs of your intended beneficiaries. For example, you may wish to make the testamentary trust optional and give your principal beneficiaries the choice to take the whole or part of their inheritance directly rather than in a trust. Alternatively, you could make the testamentary trust mandatory and place restrictions or conditions on how the capital or income of the trust is distributed.

The testamentary trust may have a wide pool of potential beneficiaries to provide maximum flexibility to the trustee, or you may wish to restrict the potential beneficiaries of the trust to your children and grandchildren (known as a bloodline trust).

We can discuss your wishes and guide you through your options to create a Will with testamentary trusts that suit your circumstances.

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# FREQUENTLY ASKED QUESTIONS

## WHAT HAPPENS IF YOU DIE WITHOUT A VALID WILL? INTESTACY – NSW

