# Estate affairs

## Welcome to Estate affairs – March 2014 edition

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## An enduring power of attorney - what can go wrong?

**Most of you would realise how important it is for your clients to have an enduring power of attorney. It is an extremely powerful legal document, so it's not only vital to ensure your clients have one in place, but it's also critical that they appoint the right person(s) for the job.**

An attorney must be someone your client trusts to make legal and financial decisions on their behalf in the event they lose mental capacity. The attorney can effectively do anything that your client could do whilst they had capacity. The position of an attorney carries great responsibility and requires the attorney to always act in the best interests of your client. It is a fiduciary appointment and with it carries legal obligations.

Given the critical importance of such a role, what conversation do you have with your client as to who should be appointed? What emphasis do you place on this conversation with your client? From an estate planning perspective, the choice of attorney is a 'must have conversation' that you can and should have.

**Let's consider scenarios where it can go wrong!**

**Family dispute**

Often clients want to appoint both their spouse and children as attorneys. They could act jointly, but if they can't agree on a legal or financial decision, no action can be taken. What if one of the children is living overseas? This makes it very difficult to get signatures on documents!

They could be appointed jointly and 'severally'- meaning one could act alone without the knowledge or approval of the others. In most situations, there will be a formal arrangement with the banks to allow one of the parties to be a signatory, but this is more difficult when making decisions on shares and other investments.

You can imagine the possible problems and difficulties if the appointed attorneys don't get along or can't agree on important decisions.

If joint attorneys can't agree upon a course of action, the matter will invariably end up before the respective state tribunal (such as the Guardianship Board or the Victorian Civil and Administrative Tribunal) for a determination. Their usual course of action is to revoke any existing power of attorney and appoint an independent attorney to act in the interests of your client. Invariably, a state-based Public Trustee will be appointed to avoid future conflict. Up until then you would have likely continued to act as the financial adviser for your client, albeit via instructions from the attorney. However, on any appointment of a Public Trustee, your role will cease and your relationship with your client will end. Would your client want this to occur given that you have been their preferred adviser for a number of years? Not likely!

*Solution*
Even if your client prefers to nominate family members as their attorneys, your client can express a clear desire, either in the power of attorney document or some other form of written confirmation, that in the event of any dispute between attorneys and the matter being referred to a State tribunal, an independent professional trustee is to be appointed. It is likely that the tribunal will follow the wishes of your client if they are clearly set out.

The tribunal's position is to put itself in the place of your client and act in their best interests.

If you have a partnering arrangement with an independent professional trustee (such as AET) then this will allow you to continue to provide financial advice on behalf of your client.

This may seem to be a self-serving solution but if it is what your client wants and is in their best interests then it needs to be carried out. It is even more critical when your client operates a business or has other structures such as an SMSF or a family trust.

**Why leave it to chance when there is a solution?**

**Financial abuse**

What if temptation is too great and the attorney abuses their appointment by accessing your client's money and assets for their own benefit? They certainly won't want you around as the adviser if they have this intention.

Sadly, at AET we see more and more cases where financial abuse has occurred. It is often not until after the client has died, as part of the estate administration process, that it becomes obvious funds have gone missing. Invariably it is a 'trusted' member of the family who acted inappropriately as the attorney and other members of the family, or the executor who picks up on the abuse when the funds in the estate don't add up.

*Examples:*
In one case, when administering an estate, we noticed that regular weekly debits of a significant amount were deducted from a client's bank account over a long period of time – don't rely on the banks to pick up on this.

In other cases, 'loans' were made to assist the attorney, with the excuse being 'it is what Mum would have wanted' and often not recoverable when noticed. Often gambling problems can lead to this form of abuse.

The best advice that you can give your client is to really think about who is and who isn't an appropriate attorney to appoint. The client often does not want to acknowledge a problem in the family and hence doesn't distinguish between them. If you can foresee conflicting issues are likely to arise amongst your client's chosen attorneys - the best advice that you may ever give them is to appoint an independent attorney.

**What happens if you don't have an enduring power of attorney?**

If no power of attorney is in place the only course of action is for interested family members to apply to the relevant State tribunal for an appointment. A member of the family can be appointed in these instances, but as mentioned above, if there is any hint of conflict at that time, the relevant State Public Trustee is the default appointment.

To avoid this situation occurring, the best advice that you can give your client is to ensure proper representation is made at any hearing to ensure the person appointed is in line with their wishes.

## Who wants to be an executor?

T**he role of an executor is not for the fainthearted. It carries with it onerous legal and fiduciary responsibilities and a personal liability in the event of any negligent default when carrying out those duties and responsibilities.**

**So why is it that individual family members, friends of the Will-maker or, in some instances financial advisers, accept an appointment as an executor? And if appointed as executor, what advice have your clients been given to ensure they understand their role and responsibilities?**

**This article should provide you with an understanding of these duties and responsibilities, to allow you to have a relevant conversation with your client concerning this important role.**

**The executor's role in simple terms**
The executor acts as the legal personal representative of the deceased or, in other words, they 'step into the shoes' of the deceased person.

Some of those duties and responsibilities include:
- preserving and protecting all estate assets including business interests and vacant property
- identifying and collecting all assets and to pay all debts and liabilities including taxation
- providing an account of the estate administration, which means detailing all receipts and payments made in the estate and providing this information to the beneficiaries
- ensuring that all beneficiaries receive their proper entitlement under the terms of the Will, within a reasonable time frame
- finalising all of the income taxation affairs of the deceased up to the date of death, and to lodge any estate trust tax returns for the period following the date of death to finalisation of the estate
- avoiding any conflict of interest between beneficiaries.

In most situations, an executor will seek the assistance of a legal practitioner or trustee company to assist in the administration of the estate and in carrying out these duties and responsibilities. The advice provided will give some comfort to the executor that they have carried out their responsibilities in the correct manner. But notwithstanding this, an executor will continue to be personally liable in the event of any default. They may have a potential claim against any legal adviser for negligent advice, but who wants to be involved in this sort of action or litigation?

**Traps for the unwary**
*Finalisation of taxation aspects* - this can often be tricky. Most legal advisers will simply suggest to a private executor that they need to engage a tax agent to finalise the deceased's taxation affairs but they won't take responsibility for this part of the estate administration. The tax agent must be familiar with the finalisation of deceased estates which in itself is a complex area and needs expert advice. In our experience, the local tax agent, may not always have the necessary expertise.

*Transferring assets to beneficiaries*
Should assets be sold within the estate or transferred to beneficiaries in-specie?

For all assets transferred in-specie, the executor should provide information to the beneficiaries about the 'cost base' of assets. This is particularly applicable to shares, managed funds and other investments that carry a capital gains tax (CGT) liability. It will also apply to investment properties other than, generally speaking, the principal place of residence of the deceased.

There may be taxation benefits in selling assets whilst the estate is being administered to take up any capital gains or tax losses in the estate rather than transfer that to the beneficiaries. Selling assets within the estate may or may not be the correct decision that an executor should make. Therefore, specialist advice will be strongly recommended in dealing with these often complex issues.

*Non-resident of beneficiaries* – there are significant tax issues if a beneficiary is a non-resident and CGT assets are being transferred to them. Without going into the complexities, there is a deemed disposal of CGT assets when assets are bequeathed to non-residents. Any taxation incurred as a result of that deemed disposal is taxed in the deceased's date of death taxation return and must be accounted for before any distribution occurs.

*Correct interpretation of a Will* – this is often a concern with older Wills and of course the ever problematic home-made Wills. A private executor is often appointed to administer these estates. If complications arise, the executor will be embroiled in litigation to resolve any issues or disputes that may occur. Action required of an executor in these instances will generally be time consuming and emotionally draining.

*Claims against the estate* – We see more and more estates where family members are treated differently in the Will and hence inheritance or family provision claims are made. The executor will necessarily be involved in all litigation which is invariably expensive and divisive amongst family members.

*Superannuation* – as we all know this may or may not fall into the estate. The executor may be required to make submissions to a superannuation trustee as to where the payment should be made or, in the worst case scenario, they may be part of a Superannuation Complaints Tribunal hearing to resolve a dispute. Again, this is very time consuming even though lawyers may be acting for the executor. In relation to a self-managed super fund, the executor may be required to step into the shoes of the deceased trustee, which we know carries with it further responsibilities and obligations.

*Family trusts and private companies* – the executor may be required to take on the role of a deceased trustee of a family trust, the role of the appointor of the family trust, or perhaps be appointed as a director of the private family company. The executor then has different obligations not originally contemplated when they accepted the role as an executor.

*Executor's commission* – an executor is not automatically entitled to claim executor's commission for their time and effort. Any claim for costs need to be approved by the beneficiaries and, if not, an application needs to be made to the Court. A Court will generally allow an executor to be reimbursed for what they refer to as their 'pain and troubles' in acting as executor.

As can be seen from the above, and depending on the circumstances of each estate, the 'simple' executor role can blow out into a range of complexities which were not initially contemplated. Once probate is granted, an executor can't simply resign. The only way of removing an executor is for the grant of probate to be revoked and a new executor appointed. This is not something that the Courts willingly do.

**Summary**
In discussing your client's estate planning needs, and in particular the role of executor, you and your client should never underestimate what that role will entail.

If your clients have been asked to act as executor for an estate with a complicated family structure or sophisticated asset structure, then this may be a good indicator that the role of an executor is not for them and is more suited to an independent and impartial professional trustee, such as AET.

## Working in partnership with you

At AET, we are always willing to work in partnership with you to provide your clients with specialised advice on estate planning and trustee services.

Our services complement your existing financial planning offering to provide outcomes that are best suited to your client's circumstances.

You continue to maintain the client relationship and investment management function. And, unlike our competitors, our offering can be 'unbundled' to suit your client's individual needs and circumstances.

For information on how we work in partnership with advisers please refer to the flyer What happens when a client dies? Your role as financial adviser, our role as professional trustee.

Our standard fees for acting in conjunction with you are set out in our fee schedule. For high net worth clients, or for those with special circumstances, please contact us to discuss fees applicable to your client's circumstances.

**More information**
For more information about working in partnership with us, please contact your AET Business Development Manager:

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