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ESTATE PLANNING GUIDE

A detailed review of the many aspects to consider when developing your estate plan.

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ESTATE PLANNING GUIDE

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INTRODUCTION

Estate planning involves much more than the preparation of a Will. It involves planning for events during the lifetime of an individual, following their death and possibly, for subsequent generations.

During the lifetime of an individual, estate planning can involve consideration of:

- the provision of authority to individuals through a range of enduring powers of attorney;
- structuring of superannuation to ensure maximum benefits pass to dependants; and
- the possible creation of trusts to provide for successive generations.

Estate planning documentation also provides for the action which is to occur following the death of an individual including:

- the appointment of an executor or executors to attend to the directions contained in the Will;
- the listing of beneficiaries and the extent of their interest in the estate of the deceased; and
- the possible creation of trusts to provide for successive generations.

This estate planning guide enables individuals, couples, families and extended families to effectively consider the various issues surrounding the process of estate planning and to put in place the range of documents which comprise an appropriate estate plan for their circumstances.

Each of the relevant topics covered within this estate planning guide provides an explanation of the particular topic and a flowchart which sets out areas for consideration as part of the estate planning process.

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YOUR ESTATE PLANNING CHECKLIST

As outlined in the introduction, estate planning is more than preparing a Will. Outlined below are a range of circumstances to consider when planning your individual estate plan.

Personal status

We may need to have a plan of your family tree with names, dates of birth and nature of relationship. Other information we may require includes:

- Are you single?
- Are you engaged to be married?
- Are you currently married?
- Are you still married but currently separated?
- Are you divorced?
- Are you in a relationship (but not married) that has lasted for at least two years?
- Have you been married before?
- Do you have children (whether living with you or someone else)?
- Are there children living with you who are not your own?

Do you wish to cut family members out of your Will?

If this is required, please confirm your reasons.

Do you have any previous Wills?

If you do, we may need a copy.

Do you have real estate in your own name or with someone else?

If you do, we may need copies of the titles.

Do you have bank accounts, shares or other assets in your own name or with someone else?

If this is case, we may need copies of statements and other proof of ownership such as share certificates, holding statements and policies, showing details such as dates acquired.

Do you own any companies, trusts, life insurance or superannuation funds?

If you do, we will need copies of the company constitutions, trust deeds, life insurance policies and superannuation trust deeds.

We will also need details of the assets held by these entities such as share certificates, policies and statements showing dates acquired as well as directors and shareholdings including a flow chart or plan for each entity.

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Do you have your own business?

- Is it in your own name?
- Do you run it with a partner?
- Does the business structure include a company or trust?

Do you currently owe any borrowings to any person or entity?

We will need a record of when, how much (including interest), to whom (or which entity) money is owed and when you are to repay the amount.

Do you have any borrowings owed to you by any person or entity?

We will need a record of when, how much (including interest), to whom (or which entity) you loaned money and when the loan is to be repaid to you.

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WILLS – A GUIDE

This guide around creating your Will prompts you to consider many aspects. Take your time going through the issues below - some of them may be confronting, and you may find that you must plan for options that you have not even considered yet.

It may also help to consider these important issues in consultation with your accountant and/or financial planner. Remember, once you have made your decisions, you will have made a plan for your family's future that will cover most of the possible outcomes. That said, you can always change your Will later if circumstances require it.

Your first choice of executor

Your Executor is the person you appoint in your Will to carry out your wishes as set out in your Will. After your death, the Executor may need to apply to the Supreme Court for a grant of Probate to be given lawful authority to administer your estate.

Your second choice of executor

The substituted Executor is your second choice of Executor who only administers your estate if your first choice of Executor is unable or unwilling to take on the role. Where you are in a relationship with another, we suggest that you consider both appointing the same person or persons in your Wills to be your substituted Executors.

Guardians - children under 18

Who would you want to have the daily care and control of your children under the age of 18 if you both die? For example, you might decide to appoint your substituted Executor as your Guardian. You will also need to consider whether the Guardian is to be involved in the financial administration of the estate.

If you appoint more than one Guardian, it may be best for them to be from the same household. If they are to have the daily care and control of the children, then they should have the absolute right to do so. You may also wish to consider leaving instructions as to whether your children are to be brought up in a particular religious faith.

Your beneficiaries

Your beneficiaries receive the distributions from your Estate upon your death. Please consider the following:

- If you are in a relationship and only one of you dies, leaving a surviving spouse or partner:

Many husband and wife Wills appoint each other to be the sole beneficiary as well as sole Executor. This makes good common sense. However where spouses have been married before, if one spouse dies leaving the whole estate to the surviving spouse, then the surviving spouse owns everything in her or his own right. The children in this case own nothing and they can only rely on the surviving spouse’s good judgment to deal with assets and income as she or he sees fit.

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An important point to note - unless the Will states otherwise, a beneficiary must survive the deceased by 30 clear days. Otherwise the law presumes that that beneficiary has predeceased the deceased.

- **If you are in a relationship and both of you die:**

Parents often wish to give their estate to their surviving children. If you wish to include specific provisions, review your Will whenever your circumstances change. Otherwise, review your Will every few years to ensure that your intentions are still appropriate.

- **At what age should your children get a share of your estate?**

What happens to children who may be born after your death? If you consider that artificial insemination such as in vitro fertilisation or other technological advances should be allowed for in your Will, please let us know.

- **Grandchildren:**

Your children may have children of their own when you die. Some people prefer that only their surviving children share in their Estate, while others decide to leave their estate on a 'per family' basis, so that the children of any deceased children (i.e. grandchildren) receive the share in the estate that the parent would have received.

- **Specific assets:**

Some people decide to leave specific assets to beneficiaries named in the Will. That can include specified items of jewellery or other personal effects.

- **Death of your whole family (for example, in a car, train or plane accident):**

Tragically, this occurs. You may wish to consider your options carefully, and discuss these options with us.

- **Other wishes, such as funeral, cremation, organ donation:**

It is a good idea to discuss and share your wishes with your family and/or your Executor. This can save much anxiety later on.

Superannuation

Superannuation is not an asset of your Estate. Only if the super fund trustee in fact pays the money to your Estate can your Will control the distribution of the funds.

While there are procedures to appeal against a decision of a super fund trustee, these are complicated and it is wiser to deal with this issue now.

Special instructions

Please let us know if you have any special instructions to put in your Will. For example, you might have special requirements for burial or cremation, or you might have children by another marriage, or you may conduct your own business (personally or through a partnership, company or trust). Access to a record of passwords can be of great assistance to your Executor.

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Administration of your estate

To make administration of your estate easier, please compile a list of your current assets and liabilities, bank details, financial contacts and so on, and keep this list with your Will along with any special wishes.

Testamentary trusts – special considerations

If you are likely to be leaving a spouse and/or children considerable assets under your Will, you may affect future pension entitlements. Testamentary Trusts (trusts created under your Will) can avoid such issues.

Testamentary Trusts are also appropriate options when you are concerned about leaving assets to a beneficiary who is a spendthrift, who may later become bankrupt or possibly suffer a marriage breakdown.

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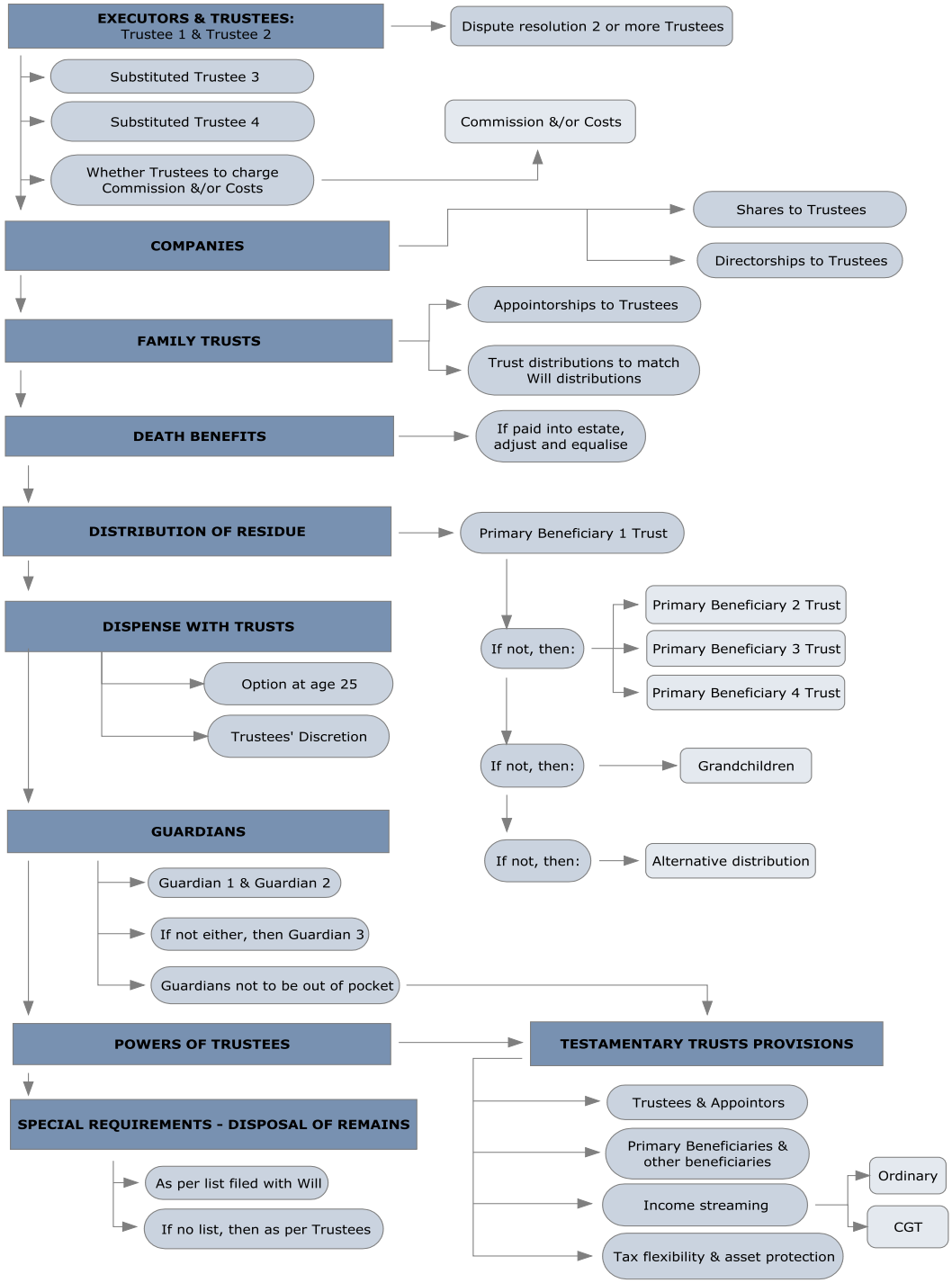
WILL OF A WILLMAKER



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TESTAMENTARY AND INTER VIVOS TRUSTS – A GUIDE

INTER VIVOS TRUSTS

Inter vivos trust instruments (between living persons) are written deeds that are signed, sealed and delivered to prove and testify that the parties have agreed to the contents of those deeds.

A testamentary trust is a trust established by the Will. It does not come into effect until after the willmaker's death, and specified deceased estate property is then transferred to a trustee to hold the assets upon trust for the benefit of the beneficiaries. Note that a testamentary trust is not the same trust as the estate proceeds trust.

In most states, a testamentary trust can last for up to 80 years after the death of the deceased, meaning it can continue even after the estate has been fully administered. It is worth noting that all trusts are governed by the rule against perpetuities which in each state and territory (except South Australia) is limited by statute to have a maximum "life" of 80 years.

Trusts are created for two main reasons: asset protection and tax flexibility. As such, they can also be useful vehicles in which to run family businesses. However, succession issues must be resolved separate from the Will for those who die while being:

- Holders of a power of appointment of a family trust
- Unitholders of a unit trust
- Individual trustees or alternatively directors and shareholders of a corporate trustee

Trusts can take on a variety of forms, from the very simple to the complex (similar to inter vivos trusts such as family discretionary trusts, unit trusts and hybrid trusts).

Some examples are:

- Fixed entitlements to income and/or capital
- Income only
- Capital only
- Single beneficiary advancement trusts (capital and/or income)
- Life interests with remainder beneficiaries
- Right to reside (personal right and not transferrable)
- Fully discretionary

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TESTAMENTARY DISCRETIONARY TRUSTS

As noted previously, there are different types of testamentary trusts with some similar to discretionary family trusts. However, while family trusts are created during a person's lifetime, testamentary trusts are created under a person's Will and operates after that person dies. The Trustee of the Will (unless a separate Trustee is appointed under the Will) controls the trust assets for the benefit of the beneficiaries.

There are also different versions of discretionary family trusts including lineal descendants discretionary trusts that purely follow the bloodline of the willmaker.

How do they work?

The Will usually contains a separate discretionary trust for each of the willmaker's primary beneficiaries to avoid potential tax traps involving family trust elections. The Trustee of each trust has the discretion to decide which beneficiaries are to receive distributions of income and/or capital from that trust, and will apply for a separate TFN, operate bank accounts, keep separate trust records and lodge separate tax returns.

When do they start?

The trust starts after the death of the willmaker once the estate administration has been completed.

When do they end?

The trust will last a maximum of 80 years.

What are the trust's assets?

Only assets solely owned by the willmaker pass into the trust. Assets held jointly or in other entities (such as existing family trusts and companies) do not pass into the trust. As noted above, superannuation and life insurance proceeds do not automatically form part of the Estate.

ADVANTAGES OF A TESTAMENTARY DISCRETIONARY TRUST

Tax Flexibility

- **Income splitting:** Total tax payable by a beneficiary on income earned by the trust can be reduced
- **Income to minors:** Income can be distributed to minors at normal adult marginal rates (the first $18,200.00 of trust income is distributed tax-free). Family trust distributions to minors are limited to $416.00 (plus any low income rebate) before being taxed at the top marginal rate.)
- **Stamp duty:** No stamp duty payable on the creation of the trust, and property under the Will transferred into the trust is exempt from stamp duty.

- **Capital gains tax:** Capital gains tax may be effectively deferred. It is not until the trust disposes of an asset that it attracts CGT. Capital gains can be distributed between beneficiaries in a tax effective manner.
- **Land Tax:** Trustees can access land tax concessions.
- **Superannuation and Insurance proceeds:** the level of distribution to irrespective dependants depending on the circumstances prevailing at the relevant time can maximise the preferential tax status of the proceeds.

Asset Protection

Beneficiaries don't actually own any of the assets, but only become entitled to any trust capital and/or income after the Trustee decides to make a distribution to them. Because the Trustee holds the legal title to the trust assets, these assets are generally immune from attack by spouses, creditors and other beneficiaries.

Other examples:

- Minor or impaired mental capacity
- Gambler, alcoholic, spendthrift, etc
- Bankrupt
- Marital breakdown
- Restrict access to capital and/or income until a certain age

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ENDURING POWERS OF ATTORNEY – A GUIDE

Overview

There are three types of Enduring Powers of Attorney: Financial, Medical and Guardianship. All must be signed in the presence of two witnesses, one of whom must be qualified to witness statutory declarations.

You, as the donor, appoint others to manage your affairs on your behalf, especially if you lose capacity. It is a powerful and binding legal document and retains its validity (or "endures") even when you are no longer capable of handling your own affairs. You can revoke it at any time and it is automatically revoked upon your death.

Financial

This type of power of attorney gives one or more people wide powers to act as your attorneys to manage your personal and legal affairs. If you choose, it can be used while you are still able to look after yourself.

Your attorney can purchase and sell your properties, control your investments and assets, collect your income, operate your bank accounts, organise your income tax or pension requirements and in general manage your assets. You can set limits on the powers you give to your attorney.

You can appoint one person or two or more people to be your attorneys. If you appoint two or more, you can choose to have either one or the other to act, or you can state that both must act jointly on your behalf. You can nominate when and under what circumstances your power of attorney will start.

A "Certificate of Witness" must be prepared and witnessed by at least one person authorised to sign statutory declarations, (such as a solicitor). This certifies your capacity as the donor (the person making the power of attorney). To have an effective document, your attorneys must also sign a "Statement of Acceptance" and give undertakings as to their conduct, and must keep accurate records of all dealings and transactions they make while acting as your attorneys.

Medical

Unlike the financial power of attorney (which can be used at any time), your medical power of attorney only takes effect after you lose capacity.

Your agent (the person you nominate to act on your behalf) then has the power to make decisions about your medical treatment. The term "Medical Treatment" includes major medical procedures such as operations or taking medicine or drugs. It does not include minor medical procedures involving pain relief or providing food and water.

Your agent also has the power to refuse any medical treatment that would greatly distress you. It only allows one person at a time to make your medical decisions. Your other agents can only act if your first agent is unable to act or has died.

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Guardianship

This type of power of attorney enables you to appoint an enduring guardian to make 'lifestyle' decisions on your behalf after you have lost capacity.

You may choose to specify exactly the type of decisions the guardian can or cannot make, and any other factors the guardian should take into account in making those decisions. If you do not clearly state the powers the guardian is to have, and the time comes when you are no longer able to make decisions for yourself, your guardian will have the same powers as if he or she were your parent and you were the child.

To have an effective document, your guardians must also sign a "Statement of Acceptance" in the presence of two witnesses, one of whom must be qualified to witness statutory declarations.

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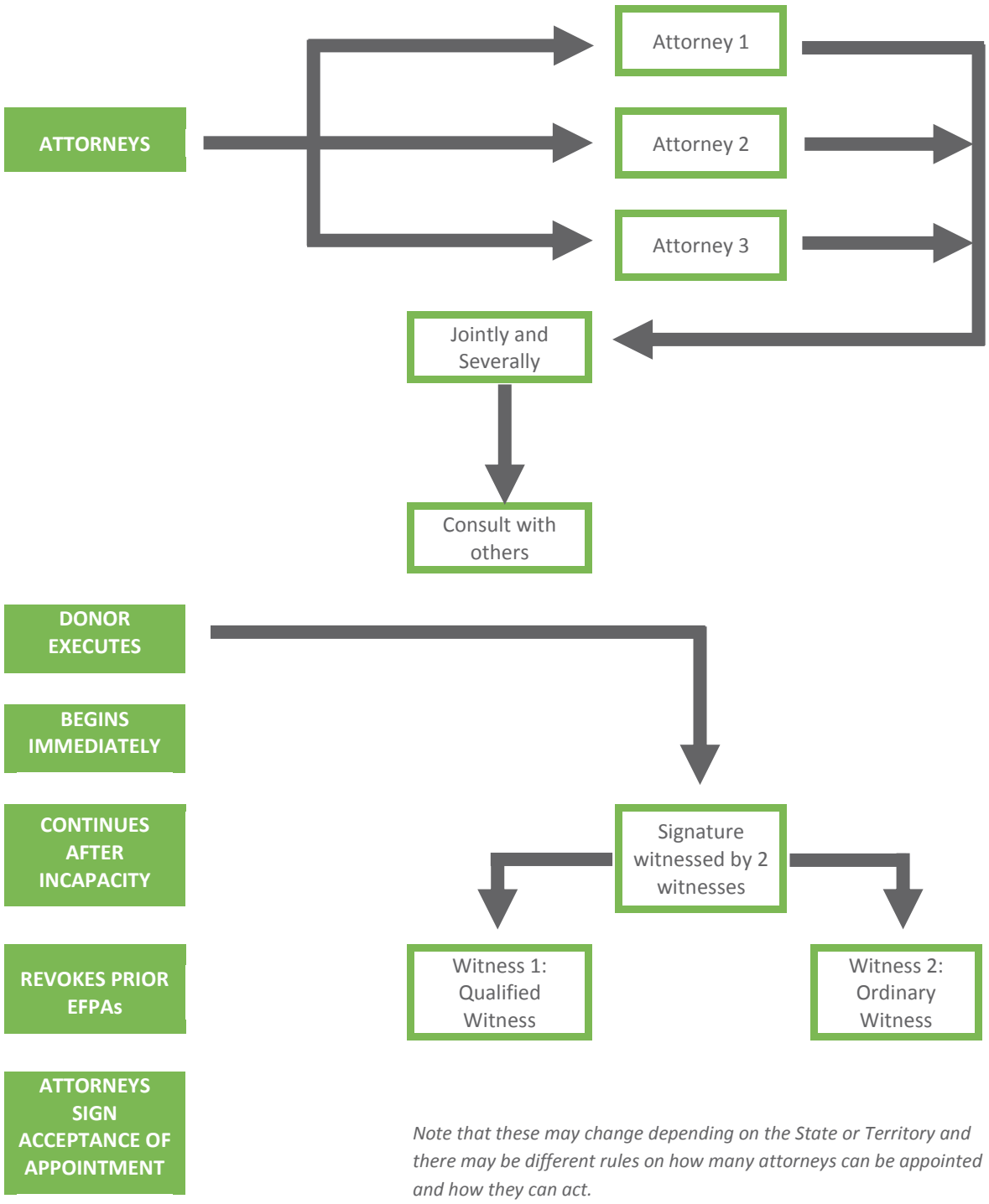
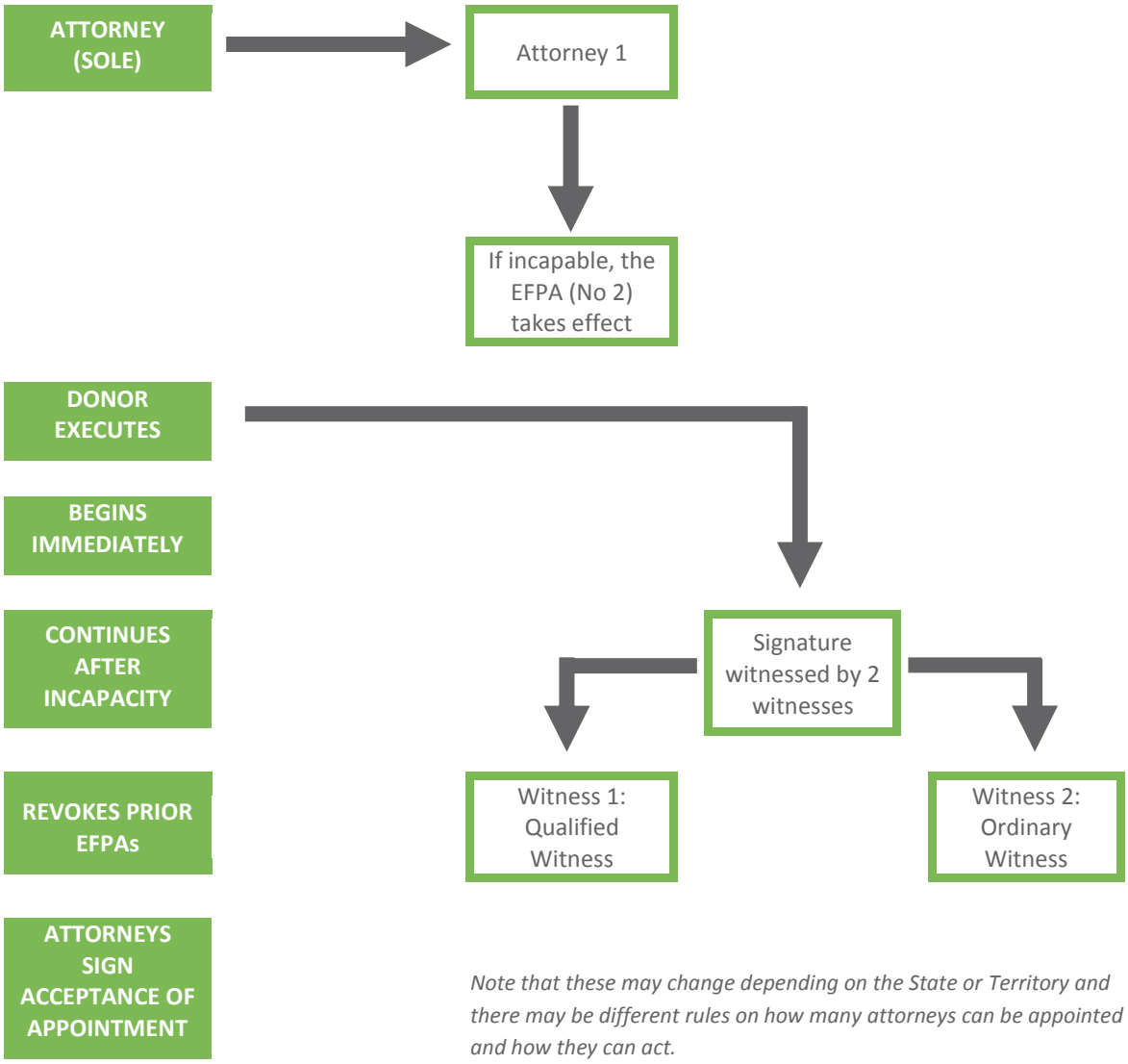
ENDURING FINANCIAL POWER OF ATTORNEY OF DONOR (STANDARD)



Note that these may change depending on the State or Territory and there may be different rules on how many attorneys can be appointed and how they can act.

ENDURING POWER OF ATTORNEY (NO. 1) OF DONOR



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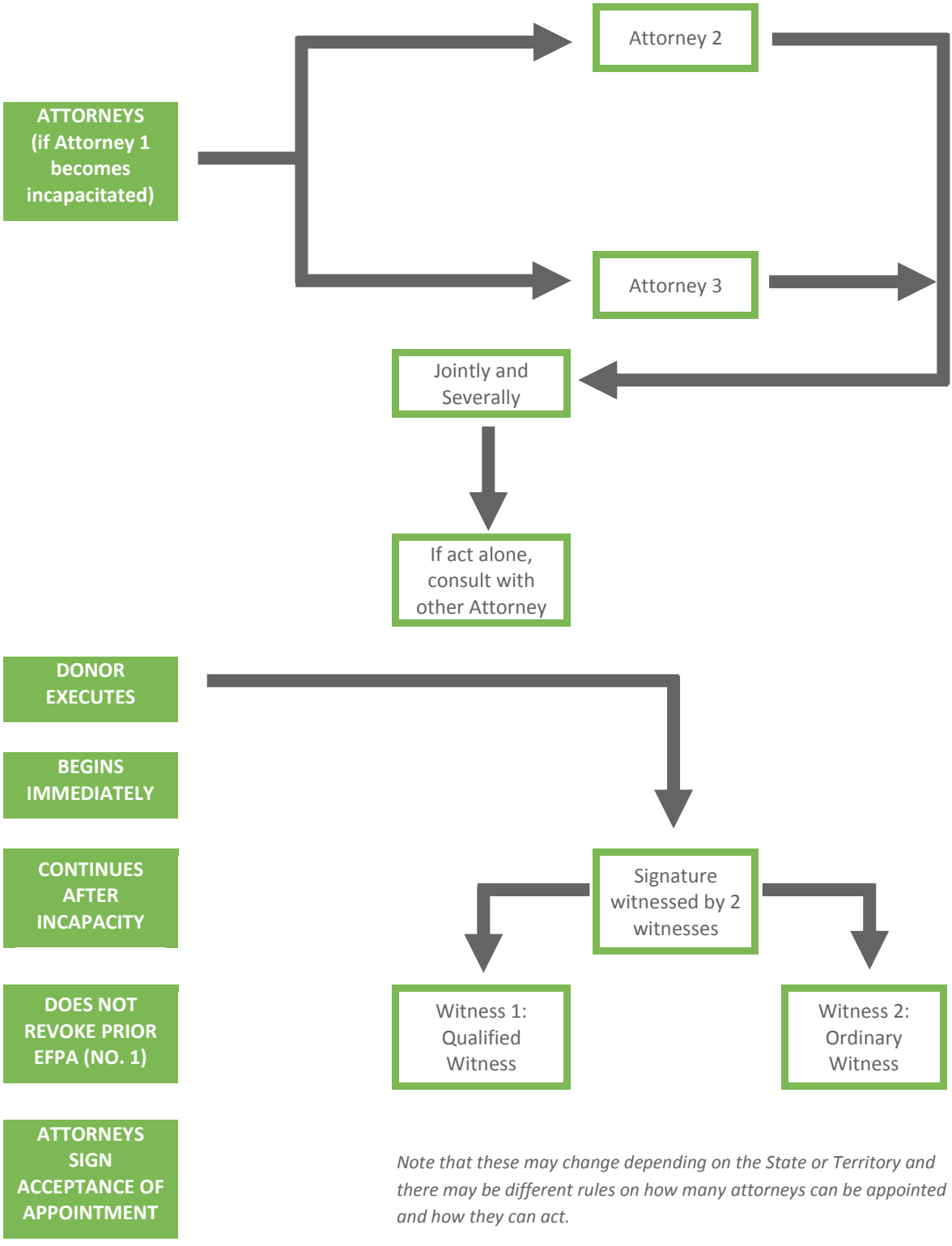
ENDURING POWER OF ATTORNEY (NO. 2) OF DONOR



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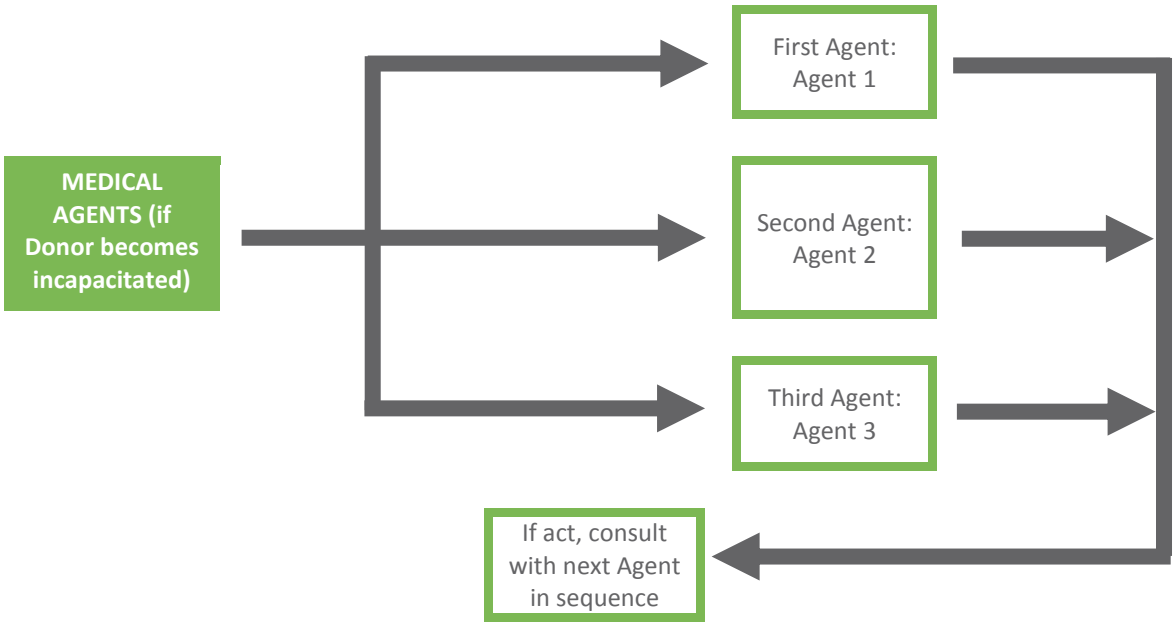
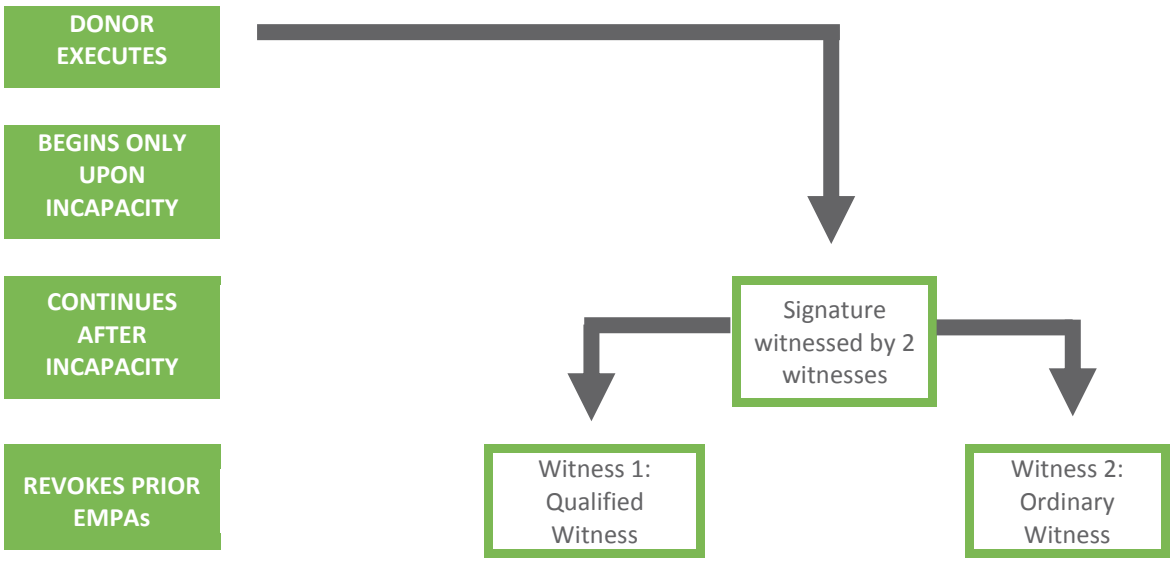
ENDURING MEDICAL POWER OF ATTORNEY OF DONOR





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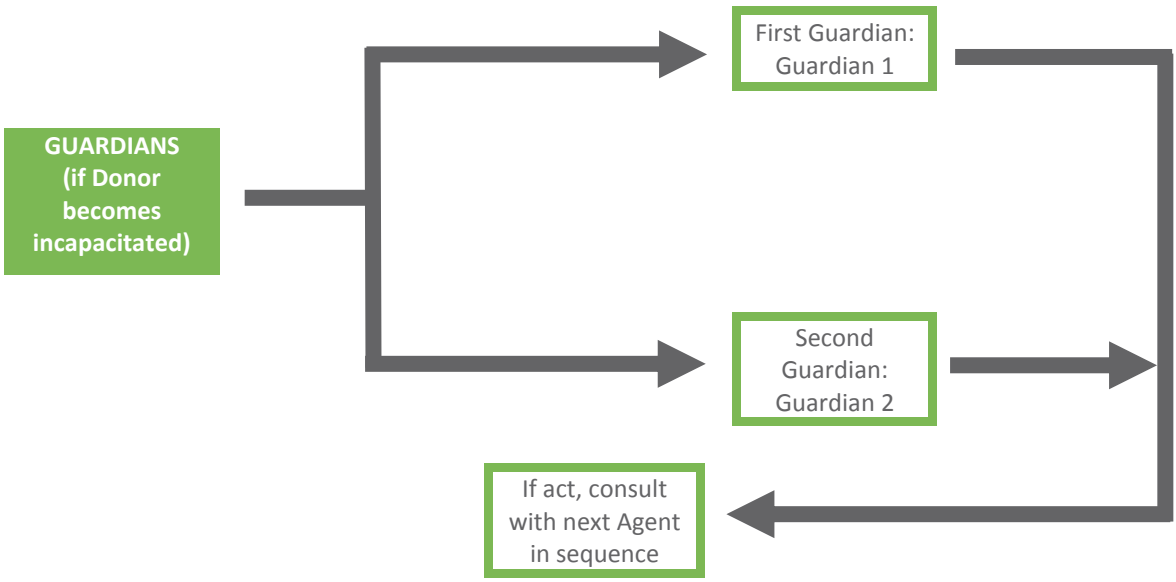
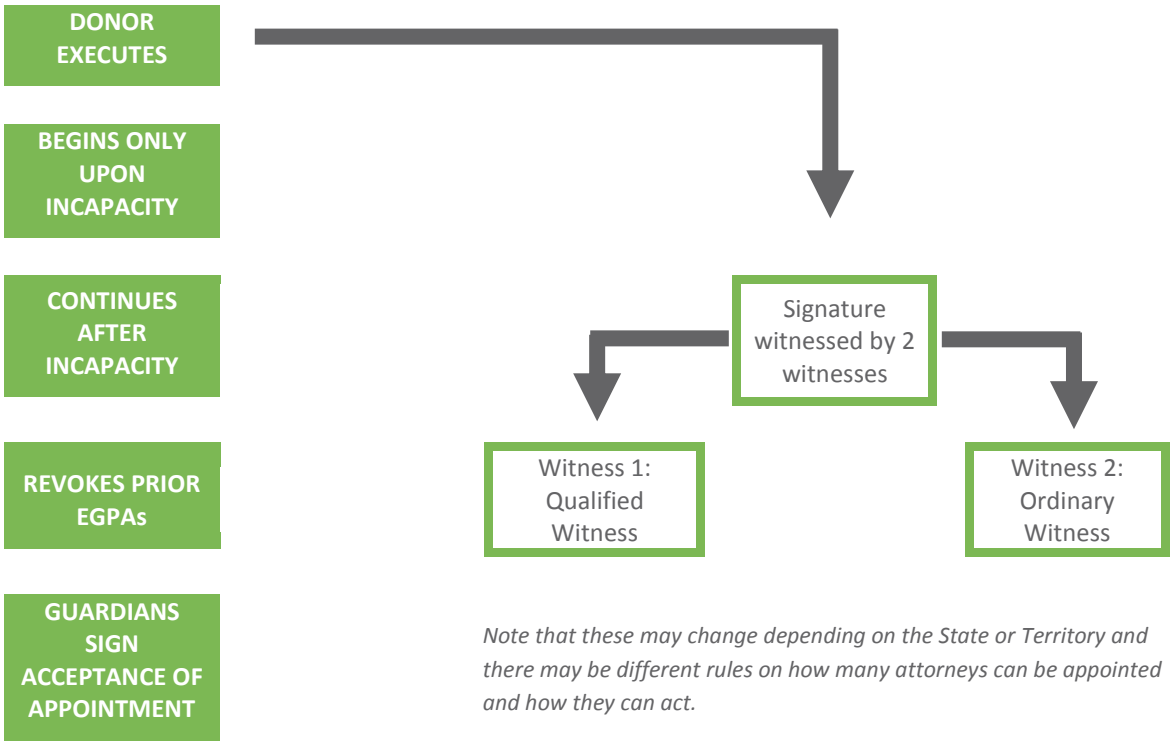
ENDURING GUARDIANSHIP POWER OF ATTORNEY OF DONOR





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FAMILY DISCRETIONARY TRUSTS – A GUIDE

What are they?

Also called "family trusts", these enable income and/or capital to be distributed to beneficiaries, often members of the same family, at the trustees' discretion. However, until trustees exercise their discretion, beneficiaries have no claim on the trust property. This enables discretionary trusts to be used for asset protection and tax flexibility.

What are their benefits?

In addition to asset protection and tax flexibility, other benefits of a discretionary trust include flexible income and capital distributions. Trust deeds can be adapted to specific needs.

When do they start?

Discretionary trusts are created when settlors give money or property ("the settled sum") to trustees to hold on behalf of the trust beneficiaries. Settlors should not be beneficiaries of the trusts. The settlors' job is simply to create the trust fund and nothing else. To be valid, trust deeds may need to be stamped depending on the State or Territory. Prices will vary depending on the State, e.g. stamp duty is $200* in Victoria.

Trustees

Trustees legally own the trust property, and are responsible for trust management. They have many legal duties imposed on them. For instance, they must act in the best interests of the beneficiaries. However, their overriding duty is to obey the terms of the trust deed.

Under certain circumstances, trustees can be personally liable for trust debts and transactions. Sometimes, it is a good idea to use companies as trustees, even though directors may be personally liable in certain circumstances, because:

- Companies never "die"
- When directors or shareholders die, new ones can replace them without changing trustees of the trust
- Trustee companies will not have any assets that could be claimed by creditors of the trust

Appointors

Appointors have the actual control of the trust assets because they have the power to appoint and remove trustees.

Having a number of appointors, including an independent appointor, can give greater benefits for asset protection and succession planning. Companies can also be appointors.

**as at September 2013.*

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FEES – A GUIDE

The costs of preparing your estate plan will depend on the simplicity or complexity required to complete the appropriate documents for your individual needs.

Should your requirements be straight-forward, you may only need a Will and/or Power of Attorney prepared. Prices for these documents are available on our website.

For more complex situations, before we commence a full estate plan, we work with you to determine your requirements. Based on this initial review, we then provide you a detailed quote to complete your estate plan. This provides you with the peace of mind of the costs before we proceed.

Will Documentation

Topdocs Legal has eight types of Wills to cater for various requirements. To help you determine the best Will for you, please review our brochure, "**Determining the best Will for your needs"**, located in the Estate Planning section on the Topdocs website.

More information

We trust this estate planning guide has provided a solid starting point for the preparation of your estate plan. Should you require more information or would like to talk to an estate planning specialist, please call Topdocs Legal on 1300 659 242.