

Macquarie Law

Peace of mind

Directions for family, executor/s and trustee/s

It is difficult to think about death, particularly our own, but as they say, “the only certainties in life are death and taxes”. There is no such thing as bad luck because you are organised for death. On the contrary, some forward planning can result in a great deal less stress and uncertainty for our families.

When making a will it is also possible to leave some directions for your executors and trustees. Following are some of the things that you might consider to leave directions about. These could be handwritten or typed notes signed and dated by you. Keep a copy of your directions with a copy of your will at home. Also give a copy of your directions to me to store with the original will and any other important documents that I hold for you.

It is a good idea to talk to your family about your will and the directions that you want to give to them. Your family will then know what you want to happen. This can save arguments when family is grieving after you have passed on.

Medical treatment

- What are your views about your health care and life being sustained by artificial means?
- Would you like to donate your organs and/or tissues to save lives?
- Do you need to appoint guardian/s in the event you are too unwell to give instructions to your medical practitioners and there is no next of kin available for medical staff to talk to.

Funeral

- Are you a member of a funeral fund? Do you have a burial plot or funeral prepaid?
- What funeral arrangements would you like? Where would you like to funeral to take place?
- Would you like a church service and/or graveside service?
- Do you prefer to be buried or cremated? Where would you like to be buried or interned?

Distribution of gifts

- Bear in mind that it is often a good idea to give some things away during your life. Are there some gifts that you could make now and see the gratitude of the beneficiary during you life?
- Although your estate may be left in equal shares to beneficiaries can you give your executor any guide as to how to distribute various individual items?
- Should sentimental or historical items or collections go to particular family members?
- Are there any things in your possession that do not belong to you?

Administration of estate

- Where will your executor find your important documents and financial records?
- Recommend to your executor and trustee that they seek advice about what they should do.
- Ask your trustee to invest conservatively, if need be.
- Do you want your executor and trustee to allow auction sales of your property?
- Do you have any business interests? If so, these should be part of a plan for sale or succession.
- Do you have any assets that your executor may not be aware of? For example, shares, a business interest, artworks, patents, trademarks, outstanding loans or assets held elsewhere.

- Do you own any items that have a special value? If so, how should they best be handled or sold?
- What about memberships, email accounts, online services & passwords, websites, domain names and social networking sites?

Carers for infant children (if any)

- Testamentary guardians of your young children can be appointed in your will but it is not always necessary.
- Would you like to leave any advice or instructions for your executor, trustee or guardian about raising your young children?
- Do you think boarding school may be an option?
- Do you want to leave instructions about any trust for the maintenance and advancement of your children?

Enduring power of attorney

An attorney properly appointed can do most financial things that you can do. An enduring power of attorney operates only during your life but importantly it operates even after you have lost capacity. A power of attorney can operate from the time that it is signed, that is, immediately. It is very important to have a power of attorney in the event that we become incapacitated. That may never happen. Hopefully, it does not, but if a power of attorney is not in place beforehand it may not be possible to put it in place after you lose capacity. Sometimes people appoint attorneys to act for them while they are travelling overseas or just for a particular transaction.

Enduring guardian

The appointment of an enduring guardian only operates during your life but unlike a power of attorney it only comes into effect when you become incapacitated. That is because a guardian makes decisions about your health, care and accommodation, which is not necessary for the guardian to do if you have the capacity to do it for yourself. The appointment of a guardian is very important if you do not have immediate family that medical staff can speak to in the event of your incapacity. Consider giving your guardian directions to refuse or withdraw consent to medical treatments and life support for you.

Costs

There are legal costs involved with the preparation of wills, powers of attorney and the appointment of guardians. You do not incur costs if you prepare your own instructions for your executors, trustees or guardians. Making a will that is likely to last you for a long time and allows for a few different contingencies can also save costs.

Ask for an estimate of the costs for preparing a will or whatever you need. Most legal work can be undertaken in stages. You definitely need a will but if you are young you may decide to put off making a power of attorney for a while. You may never have the need to appoint a guardian. Do keep in mind the costs that can be incurred by your estate and family if you are not organised.

All of these things are matters that you can talk to me about. Then after some discussion we can work out the best way for you to proceed, so that you will be prepared.

Topics that could be added:-

- * 2012 Law Society Journal article referring to Advance Care Directives as a separate thing from the appointment of an enduring guardian. Darryl Browne believes ACDs should be done in conjunction with a guardian appointment while Pam Suttor is not in favour of ACDs. See the US medical site for a detailed ACD that can be generated: <https://www.makingyourwishesknown.com/>
- * There is a difference between testamentary capacity and decision-making capacity
- * Could move heading for Directions down and insert a heading Will/s before that
- * What would you like to do with your pets or other animals?
- * Could add a heading “Assets & liabilities” or “Record keeping”.
- * Do you have life assurance? Who owns the policy and who is the beneficiary?
- * Do you have a SMSF? Have you made a binding death beneficiary nomination (BDBN)? Is the BDBN valid? See Tax Institute article: your legal personal representative (executor) does not automatically become a trustee it depends on what the SMSF trust deed says. Need to check the SMSF trust deed for who will be holding the purse strings upon a member’s death?
- * Have you kept records of the cost of assets eg real estate or shares for capital gains tax calculations?
- * Do you have a family company or trust? What loans do you and your family owe to the company or trust? How long has any trust been going for?
- * Do any children have special needs?
- * Tell guardian about wanting to donate organs.
- * Mention testamentary trusts. In one sense many of the assets in your estate will be held in a trust created by your last will and testament for at least a short period. A testamentary trust, however, is a meaning given by tax law to a discretionary trust created by a will. Will it be a separate trust for each beneficiary? Will a separate trust be established for super or specific assets?
- * Question whether directions need to be in the form of a statutory declaration or affidavit to be admissible in court? Couldn’t they be annexed to an affidavit by the solicitor who prepared the will, held the will or is acting for the estate?
- * Could include something about the reasons for particular gifts. Better not to include an explanation (non-dispositive provision) in wills for a boyfriend because it might mark them as someone important in the deceased’s life who may have a reasonable expectation of an inheritance (Skarica v Toska [2014] NSWSC 34)
- * Really old powers of attorney do not include the protection from ademption introduced by the 2003 legislation.
- * We can email a copy of your power of attorney to you so that you can show it or email it to a service provider that requires it.
- * What about PINs, email accounts, passwords, internet logins for when sick or passed away? Details of domain names, website hosting, Facebook and social networking sites. Some may prefer to have them shut down whereas others may be useful assets or sentimental. Digital photo sites. “Digital footprint”. Our “digital legacy”.

Death and the Internet – Planning for death is often ignored and the bereaved are left to cope as best they can. Advances in technology mean that most people enjoy an online presence and amass a range of accounts during their life. Whether it is social media, blogs, online sales or similar, upon passing of the legitimate owner these accounts often go unattended and open to abuse. CyberNapa offers a complete thanatosensitive initiative to create a plan for your client/s (whilst still living), secondly to assist in the discharge of your clients wishes in the online environment upon their passing and thirdly conduct an extensive online search and action any accounts located in the details of the deceased.

Please visit our website for our full list of services; our prices are extremely reasonable and affordable. In the event that our services are not required at present, please save our contact details or connect with me on [LinkedIn](#), for whenever the need may arise.

Regards

David Napper (CEO)

www.cybernapa.com.au

See Darryl Browne's notes about wife claiming super but having to pay it to the estate because it was in breach of trust. Suggested that may not always want to do a BDBN because of tax flexibility. Added a conflicts clause to H&W will precedent. In checklist consider who will claim or be entitled to super and life assurance.

Crypto currency

Access to digital assets upon death and incapacity: NSW Law Reform Commission Review

At the request of the NSW Attorney General, the NSW Law Reform Commission is undertaking a review of the laws that affect access to a NSW person's digital assets and digital records after they die or become incapacitated. As part of the review, the Commission is surveying lawyers on how they advise clients about managing their digital records and digital assets after they die or become incapacitated. If you would like to participate, the survey is available [here](#).

This practical session will examine how to achieve a cohesive estate plan, which takes into account both estate and non-estate assets. It covers:

- Case studies exploring control and ownership issues arising from:
 - joint tenancies
 - discretionary family trusts
 - partnerships
 - sole-proprietor business
 - superannuation funds

- life insurance payout

Utilising estate and non-estate assets to achieve equalization for beneficiaries

COVID-19 highlights the importance of living wills

Posted on 24th April 2020

by Catherine Henry Lawyers

The COVID-19 pandemic is demonstrating the importance and usefulness of [advance care directives](#) (ACDs) – sometimes referred to “living wills”.

We have been talking about ACDs for years but, as the pandemic continues, they are a key focus for those working in the public health, palliative care and aged care sectors. They should be a focus for many Australians.

An ACD, or living will, is a document (it can be as simple as a card in a wallet) that clearly sets out a person’s wishes about the type of medical care that person wants – or doesn’t want – and preferred outcomes in the case of an (unexpected) life threatening injury or illness. The document can also nominate a substitute decision-maker.

ACDs give people a voice. ACDs also provide guidance to family, clinicians and other health professionals when faced with decisions about a person’s care.

Health professionals and family members must follow a valid ACD – to do otherwise can lead to criminal or civil sanctions. ACDs are given recognition at common law (except in Queensland) and in legislation in states and territories except for NSW and Tasmania. The law is different in each jurisdiction but in NSW, an ACD made in another state or territory remains enforceable.

Clinicians have pointed out that people incorrectly believe that every person who contracts COVID-19 will be in hospital and placed on a ventilator. Some people neither want nor need to be in a hospital environment. And in the situation of a rapidly deteriorating patient needing palliative care, this can be provided anywhere – in a home and in hospital. One less person going to hospital reduces demand on precious ventilators.

Clinicians need to be able to access a very clear plan for how to proceed when faced with a rapidly deteriorating patient. ACDs provide such clarity and are of particular value when having to make decisions about hospitalisation versus home care. A living will can be placed in your My Health Record.

Well run aged care facilities start [advance care planning](#) with residents and their families when the resident comes to live there. But the need for an ACD can occur at any stage of life.

COVID-19 is a reminder to us all about the need to have the conversation about treatment options at the appropriate time, and the need for an ACD.

[Contact us today](#) to discuss how we can assist you with an ACD or any other estate planning documents.

The New Frontier: Cryptocurrencies and other Digital Assets in the Estate Plan

TVed 17 June 2022

As digital assets increase in prevalence and importance, planning for what happens to them on incapacity or death is essential. This session provides a guide to practitioners on advising clients to recognise, manage and prepare for digital asset disposition as part of the estate planning process, including:

- Advising client what will happen to digital assets when they die
- Recognising and preparing an inventory of digital assets
- Determining value and importance from personal to commercial
- Assessing and identifying essential information including private keys, digital wallets, passwords and other security measures
- The importance of keeping digital assets and records current and good management practices
- Spotlight on cryptocurrency forming part of the asset pool:
 - ensuring the executor knows where to find it
 - practical issues relating to the control over cryptocurrencies

- transferring cryptocurrency to beneficiaries – what do you need to know?
- selecting an executor when crypto is in the asset pool – should they have particular skills?
- inheriting cryptocurrency and tax implications
- When should digital assets be held in a trust?
- Planning for access in the event of death or incapacity
- Drafting for digital asset management in wills, powers of attorney and trust deeds

Challenges in administering an estate with digital assets

Session 1: The New Frontier: Digital Currency Disposition

The increasing availability and popularity of digital currency means that practitioners need to be on top of estate planning and administration process for clients with these holdings. This session provides a guide for asset recognition, estate planning and disposition, including:

- What are digital currencies and how and where are they held?
 - A guide to the most common terms, asset types and associated technologies including:
 - Cryptocurrency
 - Bitcoin
 - NFT's
 - Blockchain
 - What questions do you need to ask your clients for asset identification and disposition intention on death?
 - Inventory preparation and determining value
 - What information does your client need to give you?
 - Drafting digital currency asset disposition in the will – key issues and risks
 - Planning for access in the event of death or incapacity
 - Challenges in administering an estate with digital assets
 - Is the law keeping up with digital currency asset holdings and disposition?
- Speaker: Kimberley Martin, Director, WMM Law, Hobart

Session 2: Be Careful What You Wish for: Statements of Wishes in the Firing Line

A letter or statement of wishes accompanying a will can be a helpful tool for an executor or trustee, but also has the potential to cause discontent and lead to challenges. This session provides a tool kit for practitioners in drafting statements of wishes and a guide to avoiding the problems that can accompany these personal letters, including:

- When should a will-maker include a statement of wishes? Advantages and disadvantages discussed
- Timelines for creation and review of a statement of wishes
- What matters should be included and in what detail?
- Drafting tips and traps including using statements to explain exclusions and intentions in gifting
- What form should the statement take? Does it need to be signed or sworn?
- Are statements of wishes confidential and who can they be disclosed to?
- To what extent are statements bindings on the executor and how should they be treated?
- Does a statement of wishes form part of probate?
- Key lessons from cases

Speaker: Paul Evans, Partner, Makinson d'Apice Lawyers, Sydney

Program 2: Be Careful What You Wish for: Letters of Wishes in the Firing Line

A letter or memorandum of wishes accompanying a will or inter vivos family trust can be a helpful tool for an executor or trustee, but also have the potential to cause discontent and lead to challenges. This session provides a tool kit for practitioners in

drafting letters/memorandums of wishes and a guide to avoiding the problems that can accompany these personal letters, including:

- When should a will – maker complete a statement of wishes regarding his/her will or inter vivos family trust? Advantages and disadvantages discussed
- Timelines for creation and review of a statement of wishes
- What matters should be included and in what detail?
- What matters should not be included?
- Drafting tips and traps including using statements to explain exclusions and intentions in gifting
- What form should the statement take? Does it need to be signed or sworn?
- Are statements of wishes confidential and who can they be disclosed to?
- To what extent are statements bindings on the executor and how should they be treated?
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Beneficiary living overseas?

The UK may have an inheritance tax that could be imposed on beneficiaries inheriting from Australia? In *Re O'Hara-Tucker* [2022] VSC 572 a deed of variation was entered into in an attempt to avoid inheritance tax on a beneficiary domiciled in UK. The executors were unable to get approval of the court.