Choosing your Executors and Trustees

This Solution Brief discusses the key considerations for choosing the Executors and Trustees for your Will

Your Executors are the people who will take care of your wealth after you have died. Their tasks include locating your Will, finding out what assets and liabilities you have, obtaining 'Probate' of your Will, and then carrying out your wishes.

Your Trustees perform a similar role to your Executors. However, your Trustees' duties generally only start after your Executors have finished 'administering' your Estate, (i.e. getting in assets, satisfying debts and determining what you want done under your Will).

The role of your Trustees may involve on-going tasks with certain assets. For example, they may hold assets for beneficiaries over a period of time, or they may administer a 'discretionary Testamentary Trust' for one or more generations of your descendants.

In simple Wills it is common to appoint the same person or persons as both 'Executors and Trustees'. However, with more sophisticated estates, or Wills involving one or more Testamentary Trusts, it is common to appoint different people as your Executors and your Trustees.

Choosing your Executors

Choosing your **Executors** is an important decision.

The tasks they will be required to perform are not simple, and it is important that either your Executors have the necessary knowledge and experience to properly perform the role or are directed to professionals who will be able to assist them maximise benefits for your beneficiaries, and to avoid pitfalls.

We generally recommend you appoint a **family member** and an **appropriate professional adviser** as your joint Executors. We also recommend that you provide at least one 'alternate' Executor for each. In this manner your Executors will perform their role taking into account a balance of 'family' considerations as well as 'commercial and legal' considerations.

Choosing your Trustees

Choosing appropriate **Trustees** is also very important. This is particularly so when the role of your Trustees is likely to extend into the future.

If the role of Trustee relates to a gift to a child who is to receive the gift at some point in the future, or over a period of time, we generally recommend that the Trustees be their **parent or guardian**, together with an **appropriate professional adviser**. In this manner the family considerations will be taken into account. But there will also be a non-family member who will ensure that your wishes are properly carried out.

If the role of Trustee relates to a Testamentary Trust, then we generally recommend that the Trustees be the Nominated Beneficiary of the Testamentary Trust, together with an appropriate professional adviser. In some circumstances it may be appropriate to have another family member (other than the Nominated Beneficiary) act as Trustee with the professional adviser – for example, if the Nominated

Beneficiary is at risk of being sued, a family breakdown, has a disability, or is otherwise unlikely to be able to participate in the management of their own affairs.

Professional Executors and Trustees

As you will see from the above discussion, we generally recommend that an appropriate professional be involved as both an Executor and Trustee. The involvement of professionals in Estates can give rise to mixed feelings.

The most obvious concern is that the professional will charge fees for carrying out these roles – and that these fees may be excessive. The other concern is that the beneficiaries under the Will, or under a Testamentary Trust, may not get along with the professional.

When we are appointed to these roles, we generally answer these concerns by providing family members with the ability to apply to an independent party to have the professional replaced by another suitable professional. In this manner, while the 'role' of the professional Executor or Trustee remains, the person can be changed. The fees that may be charged are also limited to the professional's usual fees and charges and are subject to substantiation.

The potential benefits of involving a professional are considerable.

First, you can be sure that a **qualified person** is involved in the administration of your Estate from the outset. This means that your Estate will be administered taking into account relevant commercial, investment and taxation considerations.

Secondly, by involving a professional you have effectively bought **insurance** for your Estate. If your Estate is not administered appropriately, or your Executors and Trustees stray from your stated wishes, then your beneficiaries will have someone they can sue to recover appropriate damages. An appropriate professional will have indemnity insurance that should meet such claims, (whereas a family member is not likely to).

Thirdly, because the professional has nothing to gain, and everything to lose by not following your instructions, it is more likely that your **wishes will be fulfilled**. Contrast this with a family member, who may not be so strong in resisting a persistent demand from a beneficiary to access a bequest earlier than intended, or who may even whittle away the assets before they can be passed on to your intended beneficiary.

Fourthly, under evolving trust law, if a beneficiary is able to control trust assets in a relatively unfettered manner, then it is more likely that a court will order the beneficiary to apply those assets to meet a claim, whether from a trustee in bankruptcy or an estranged spouse. However, if you have appointed a professional trustee, who has a real involvement in the proper administration of the trust assets, then it is **significantly more difficult for a third party to have access to those assets**.

Involving us in your affairs

If requested, our directors will consider taking on the role of either or both Executor and Trustee of your Estate. We would generally do this in conjunction with one or more family members, and possibly your accountant (or another professional advisor). Each of our directors is a qualified and practising lawyer with expertise and experience in administering Estates.

We will provide you with the terms and conditions on which we take on these roles on request.

What next?

If you would like to speak to someone about involving us in the administration of your Estate, call us on 1300 654 590 or email us at wehelp@adlvlaw.com.au.

Further information can also be found on our website at www.adlvlaw.com.au.