

Appointment of executors and trustees

Rigby Cooke Lawyers provides a comprehensive executor and trustee service to professionals, executives, business owners, investors, individuals, families and retirees.

What is an executor?

An executor is the person you appoint in your Will to organise your funeral, identify and collect your assets, discharge your debts and liabilities (if any), and administer your estate in accordance with your last Will upon your death.

Role of your executor

- > Make funeral arrangements.
- > Identify and collect all of your personally owned assets.
- > Protect assets (e.g. insure properties, change locks etc).
- > Apply for a grant of probate and attend to legal formalities with a solicitor
- > Notify your bank, utility providers, and creditors of your death.
- > Notify your beneficiaries of your death.
- > Manage your assets, including investments and businesses.
- > Arrange for the preparation of income tax returns and, where necessary, the reconstruction of capital gains tax records.
- > Deal with any claims against your estate.
- > Discharge all of your debts, including income tax, credit card liabilities, utilities etc.
- > Distribute the balance of your estate to your beneficiaries in accordance with the terms of your Will.
- > Where trusts are established under your Will, continue the management and administration of those trusts (unless a separate trustee is appointed by your Will).

Who should you appoint as your executor?

Broadly speaking, there are three categories of persons whom you may wish to appoint as your executor:

- > family members and friends;
- > professionals, such as lawyers and accountants; and
- > professional trustee companies.

When deciding whom you should appoint as your executor, consider the following questions:

- > Will they charge my estate a fee or a commission to act as my executor and administer my estate?
- > Do they have the time to administer my estate?
- > Do they have the business acumen to discharge the duties of an executor?
- > Are they likely to outlive you?
- > Are they an Australian resident who lives in the same jurisdiction (state or territory) as you or the majority of your assets?

You may only appoint a maximum of four executors to prove your Will and apply for a grant of probate of your Will.

If you choose to appoint only one person as your executor then you should also consider appointing a substitute executor for situations where your executor is unable to act due to death or illness.

Where two or more people are appointed as executors, their decisions and actions are carried out either jointly or severally. However, where one of the executors acts alone, their actions will be carried out on behalf of all of the executors. In circumstances where more than one executor has obtained a grant of probate of the Will, there are many organisations that will require the executors to act jointly, such as Australian banks, land titles office and share registries.

What is a trustee?

A trustee is the person you appoint in your Will to manage and administer any trusts created in accordance with the terms of your Will. In most cases your trustee will be the same person you appoint to be the executor of your Will.

Role of your trustee

Once the executors have collected the assets and paid the debts of the estate, the executors' role changes to become the role of a trustee.

The trustee holds the assets of the estate on trust until they are distributed to the beneficiaries of the Will, or transferred to any trusts created under the Will.

These trusts may exist because of the operation of law (for example, where minor beneficiaries have not attained 18 years of age, or the age specified in the Will) or by choice if the terms of the Will provide that a testamentary trust is to be established.

Your trustee is responsible for managing the assets of the trust in accordance with the terms of the Will and in the best interests of the trust's beneficiaries.

Duties of a trustee

- > Follow the terms of the trust as specified in the Will (the governing document).
- > Ensure there is an investment strategy in place for the assets of the trust. This strategy must take into account the needs of the trust's beneficiaries; and seek to achieve a balance between generating income and capital growth where the trust has different people entitled to the income of the trust and the underlying assets of the trust, such as for a Life Interest trust.
- > Compile and manage the investments of the trust.
- > Distribute the income and capital of the trust in accordance with the terms of the governing document. In making distributions from the trust, the trustee will also have to review the income and capital requests from the trust's beneficiaries, and from legal guardians (for example where a beneficiary is a minor or has a disability).
- > Where the trustee has the discretion to pay income and capital, they must weigh up the request with reference to the terms of the Will or deed, the intentions of the testator and the needs and circumstances of the beneficiaries of the trust, both income and capital beneficiaries.

Who should you appoint as your trustee?

When deciding who you should appoint as trustee, consider the issues identified when appointing an executor (listed previously) as well as the following:

- > Do they have the capability to understand and follow the terms of the trust?
- > Will they understand the needs of the beneficiaries?
- > Will they have access to an accounting system which can accurately keep track of the income and capital of the trust separately, if required?
- > Do they understand the law governing the management of trusts?
- > Will they ensure an investment strategy is developed, implemented, and maintained?

In many cases the executor appointed under your Will continues on as a trustee, however, this may not always be appropriate. To determine the best solution for your circumstances, please consult with our lawyers.

Should you choose a personal or professional executor/trustee?

When deciding whether you should appoint a professional, a friend, a family member, or a professional trustee company as your executor/trustee, consider the following questions:

- > Is there a likelihood that someone will contest your Will?
- > Do you have beneficiaries in conflict?
- > Are your estate and non-estate assets complex – for example, does your estate include trust structures, businesses, or private companies?
- > Are you in a second marriage with children from a first marriage? Weighing up each party's needs and interests can be difficult especially if you intend for your spouse to benefit from your estate during their lifetime, but you intend for your assets to be distributed to your children upon your spouse's death.
- > How do you own your assets? If you do not own many assets in your personal name then the role of your executor in administering your estate may be minimal, however, this is best discussed with one of our experienced lawyers.
- > Do you wish to pay for the services of a professional trustee?

The more complex your personal and financial circumstances are, the more appropriate it may be for you to consider the appointment of a solicitor or a trustee company as your trustee.

Our Wills, Trusts & Estates team

We provide comprehensive Wills, trusts and estate planning services to professionals, executives, business owners, investors, mums and dads and retirees.

For further information, please contact a member of Wills, Trusts & Estates team below.



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Areas of expertise

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