LET'S CHAT TODAY

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With:

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Information provided is general in nature; precise application depends on specific circumstances.

TODAY'S TOPIC

Estate Planning – When Things Get Complicated

Trusts, companies, capacity and borders: the real practical impact

SETTING THE SCENE

What makes an estate plan complicated?*



Assets interstate

Different rules on recognising attorneys, registration and dealing with land.



Discretionary trusts

No one owns the assets. Control sits with the trustee and appointor.



Companies

Directors decide; shareholders choose the directors. A will doesn't change that.



Loss of capacity

Who steps in, when, and with what authority?



Uneven families

Unequal wishes, unequal wealth, children not yet born.



Family conflict

Large sums test relationships. Who can outvote whom?

**Among many other issues*

TODAY

The practical impact we'll work through



Control of trusts and companies

Trustee, appointor, default beneficiaries, and who really makes the decisions.



Ruling from beyond the grave

How far you can (and should) hardwire decision-making in a corporate trustee.



Loss of capacity

What an enduring power of attorney can and can't do for a trust or company.



Interstate, overseas and on death

Appointing and recognising attorneys across states, and what actually passes when someone dies.

All client names in today's examples are fictional — with apologies to the TV families who inspired them.

PART 1

No one owns a discretionary trust

Control is everything

THE BASICS

Three roles that decide who benefits



Trustee — makes the decisions

No beneficiary has a fixed interest. The trustee decides who receives what, within the deed.



Appointor — decides who the trustee is

The real long-term control. Whoever holds this role can change the decision-maker.



Default beneficiaries — take if no one decides

If the trustee doesn’t make a valid decision, the deed says who benefits. Every deed is different.

THE BASICS

Three “what ifs” every plan must answer

- What happens if the trustee can’t make decisions?
- What happens if the appointor can’t change the trustee?
- If neither can act, who are the default beneficiaries — and is that still the right answer?
- Each of these must be reviewed against the actual deed. Every deed is different.

A REAL SCENARIO: THE SIMPSON FAMILY TRUST

The child who wasn’t born yet

- Default beneficiaries named in the deed: Homer, Marge, Bart and Lisa
- Maggie isn’t named — she wasn’t born when the trust was established

WHO BENEFITS?

If the default position is triggered, does Maggie miss out — and how do we ensure a fair split between all three children?

Individual trustees vs a corporate trustee

INDIVIDUAL TRUSTEES

Generally act unanimously

- Unless the deed provides otherwise, or the law allows
- Rare to see several individuals acting together
- When an individual trustee dies, control becomes a question (particularly where the individual trustee is also the appointor)

CORPORATE TRUSTEE

More common

- Decisions are made by the company's directors, typically by simple majority
- Shares can be dealt with in a particular way noting shareholders may appoint directors
- The company's constitution can be tailored

PART 2

Ruling from beyond the grave

Decision-making in a corporate trustee

Shareholders choose directors; directors decide



Shareholders appoint the directors

A company may appoint a director by resolution in general meeting (Corporations Act s 201G, replaceable rule).



Directors make the decisions

Directors' resolutions pass by a majority of the votes cast (s 248G(1), replaceable rule).



So who controls the trust?

Whoever controls the votes at both levels — shareholders and the board.

Corporations Act 2001 (Cth) ss 201G, 248G

THE PROBLEM

What if a majority outvotes the minority?

THE DEFAULT

Whoever has the numbers wins

- The board decides by majority
- Shareholders can reshape the board by majority
- The bigger the trust, the bigger the temptation

THE AIM

Take the numbers game away

- Decisions that need everyone (or a neutral voice)
- A seat on the board that can’t be voted away
- Delivered through a tailored constitution

THE DEFAULT RULES

Three replaceable rules that may need countering

MAJORITY

s 248G(1)

Directors' resolutions pass by a majority of votes cast.

CASTING VOTE

s 248G(2)

The chair has a casting vote if necessary — a tie is not a deadlock.

REMOVAL

s 203C

A proprietary company may remove a director by resolution and appoint another instead.

REVIEW THE EXISTING CONSTITUTION

Most company constitutions don't include provisions to counter these issues.

Corporations Act 2001 (Cth) ss 135, 203C, 248G

TAILORED CONSTITUTION (1)

Who can be a director?

- Restrict directorships to bloodlines — lineal descendants only
- Children’s partners cannot be directors
- Mum and Dad remain the decision-makers while they can
- Consider an independent director — often a trusted adviser — who must form part of any majority

TAILORED CONSTITUTION (2)

A protected seat at the table for each child



Each child has a right to appoint a director

Their representative director can only be removed by that child.



The right needs to survive the child

What if a key child dies? Draft the right so it can pass on.



Document it

You will need documents that evidence who holds each appointment right.

TAILORED CONSTITUTION (3)

When the surviving parent dies

- Make it crystal clear: the directors become all of the children
- A named child is only a director if they consent to act
- If they don’t consent, they can still use their right to appoint a director
- Decisions are made unanimously — or with an independent director on the board

BREAKING TIES

Unanimity or an independent director?

UNANIMITY

Force the children to agree

- Most families may prefer
- The children must work it out equally
- No outsider on the board
- But one holdout can stall everything

INDEPENDENT DIRECTOR

A rational voice in the room

- Brings objectivity when emotions run high
- Breaks deadlocks — no single child can hold the rest hostage
- Often a trusted adviser who already knows the family
- Most families resist an outsider, and it adds cost

CLOSING THE BACK DOOR

Don’t let the shareholders bypass the board

- Board-level protections mean little if a simple majority of shareholders can override them
- Shareholder resolutions should require ratification at the director level

THE POINT

If the goal is to force unanimous decisions, every step is needed — or the company won’t actually make decisions that way.

Make sure the appointor can’t bypass the structure

OPTION A

Pass it to the same children

- The appointor role follows the same people as the shares
- Needs to line up with the will and the deed’s succession clause
- Downside: what if one child predeceases? Their branch may lose its say

OPTION B

Make the trustee the appointor

- The corporate trustee holds the appointor role
- Locks control into the company structure you have built
- A child’s death is dealt with through their appointment right in the constitution

Fixing the default position



Review who takes by default

If the trustee doesn’t decide, does the default position still reflect the family?



Amend the trust deed

Use the deed’s own variation power, exactly as drafted.



Duty if the trust holds property or a business

Lodge for assessment. QRO indicates family members becoming takers in default of a family trust are generally exempt — but it still costs money.

Duties Act 2001 (Qld) s 118 — as summarised by QRO; confirm against the Act and the trust’s status as a family trust

CASE STUDY 1: THE RAFTER FAMILY TRUST

Julie, her four children, and one family trust

CHILDREN

4

Nathan and Ben; Rachel and Ruby. Three of the four are divorced.

SHARES IN THE TRUST

~$2.5M

Julie is the sole shareholder and director of the trustee company.

LOAN BACK TO JULIE

$500K

Owed to Julie from the initial share purchase — net equity in trust ~$2M.

An even split from the shares is about $500K each noting Julie wants to weight the personal estate towards Nathan and Ben.

CASE STUDY 1: THE RAFTER FAMILY TRUST

The risk and the fix

THE RISK

Disgruntlement over $2M

- Rachel and Ruby see money very differently from their brothers
- If they feel hard done by, they may hold things up
- Three could align so that one child receives nothing

THE FIX

Entrench the minimum protection

- Unanimous director decisions
- Appointor aligned with the structure
- Default beneficiaries: all four children

CASE STUDY 2: THE PRITCHETT FAMILY TRUST

Jay’s three children, one well established

CHILDREN

3

Claire is very well off (having taken over the family business); Mitchell and Joe are doing okay.

IN THE TRUST

$5M

Built up through Jay’s closet business.

THE PERCEPTION

A leg up

Mitchell and Joe may feel Claire benefited from running the family business.

CASE STUDY 2: THE PRITCHETT FAMILY TRUST

Same logic — plus a gap in the deed

- Entrench unanimous decision-making in the corporate trustee
- Align the appointor with the same structure
- Change the default beneficiaries — Mitchell and Joe weren’t included

A REALITY CHECK

Not automatic — but recommended when circumstances require

THE DOWNSIDE

Hardwiring cuts both ways

- It costs more — and not every client wants the process
- Is what's in the trust worth this level of protection?
- We don't know how relationships will look later
- One holdout can bring everything to a halt

WHEN IT'S RECOMMENDED

Large sums, known tension

- The quantum is significant
- There is a real risk of collusion or unfair outcomes
- Uneven wishes or uneven wealth between children
- The client accepts the cost and the rigidity

THE FLIP SIDE OF UNANIMITY

What if one child goes rogue?

No distributions

No unanimous resolution by 30 June — income falls to the default clause, or the trustee is taxed (ITAA 1936 s 99A).

Assets frozen

Property can’t be sold, refinanced or reinvested.

The business stalls

Banking, leases and staff decisions all need sign-off.

Documents locked

If updates need everyone’s agreement, the structure can’t be fixed.

Leverage

One child can hold the others to ransom for a bigger share.

The exit may be court

Costly, slow, and it eats into the very assets being fought over.

PART 3

Appointor succession: read the deed

Every deed is different

DRAFTING MODELS

Three ways deeds pass on control

ALTERNATIVE PRINCIPAL

Defined role

Current principals appoint who becomes principal if all of them die. A sole surviving principal can still update it.

NOMINATED SUCCESSOR

Nomination

The appointor nominates a successor, on whatever terms and events they decide. No separate role in the trust deed.

FIRST / SECOND

Fixed order

The first appointor can’t pick a successor. On death, the second appointor takes over.

WHERE THE REAL CONTROL SITS

Marge’s deed: the second appointor holds the keys

- With a first and second appointor, the real control is with the second appointor
- Marge’s deed named her sister Patty as second appointor
- Marge’s plan: if I lose capacity, I want Homer to take over

THE ISSUE

Marge’s own estate plan can’t change it — control goes to Patty, not the person Marge chose. The deed needs an update.

When the amendment itself is the problem

WHAT HAPPENED

A new succession clause

- Original appointor: an unrelated person; amended to Bandit
- New chain: Bandit → Chilli → Bandit's parents
- Deed used "appointor"; amendment used "first/second principal"
- Power relied on: replacing the appointor — not the variation power

THE LESSON

Review, then fix along the way

- Check the power being relied on
- Keep terminology consistent with the deed
- Fortunately, the original signatories were still in touch — that makes a fix possible

A NOTE FOR ACCOUNTANTS

Are you an appointor?

- Accountants shouldn’t be holding an appointor role for a client unless specifically agreed
- Clients who move on may come back years later asking you to resign

PRACTICE POINT

Check your client files now — and make sure the successor provisions work without you.

PART 4

Loss of capacity

Enduring powers of attorney — financial matters

WHEN DOES IT START?

Immediately, or on loss of capacity?

IMMEDIATELY

The Queensland default

- Starts once made, unless the EPA says otherwise (s 33(2))
- Easy to use — no medical certificate needed
- Decisions can still be made while you're on holiday
- Nothing to update later
- Downside: potential misuse — duties apply

ON LOSS OF CAPACITY

For clients who want a trigger

- Comfort for clients who don't want it used yet
- But someone has to establish the loss of capacity
- If capacity is impaired before a nominated trigger, it still becomes exercisable (s 33(3))

Powers of Attorney Act 1998 (Qld) s 33

ATTORNEY DUTIES

The duties — and the penalties

s 66 — HONESTY & DILIGENCE

$34,540

Max 200 penalty units. Act honestly and with reasonable diligence to protect the principal's interests.

s 86 — KEEP PROPERTY SEPARATE

$51,810

Max 300 penalty units. Keep the attorney's property separate from the principal's.

s 106 — PAY IT BACK

Compensate

Court or tribunal can order compensation or an account of profits — even after conviction.

Also: keep accurate records (s 85) · avoid conflict transactions (s 73) · limits on gifts (s 88)

Powers of Attorney Act 1998 (Qld), current from 28/04/2026; Qld penalty unit $172.70 from 01/07/2026

WHEN IS CAPACITY LOST?

It isn’t always obvious

FRANK BARONE

Quiet ≠ incapable

Wills done in his early 70s. Three years later Marie says Frank barely talks and she’ll decide for him. Difficulty speaking isn’t loss of capacity.

LOGAN ROY

Opinions split

After a stroke, one person says he still has capacity; another says he doesn’t. Someone has to resolve it.

RED FORMAN

Won’t step in

Kitty and Eric are attorneys. Eric won’t act on the businesses, insisting Red still has capacity — partly because he disapproves of how Red ran them.

A COMMON MISCONCEPTION

Does an EPA let you run the trust or company?

No.

An attorney deals with the principal's own financial matters and assets. The shares are an asset — the directorship is not.

An attorney can't …



Act as a director

Or vote as a director. The shareholders must appoint a replacement.



Make or revoke a will

Or another power of attorney or advance health directive.



Vote, or consent to marriage

Voting, marriage and adoption are "special personal matters".

Powers of Attorney Act 1998 (Qld) sch 2 s 3 (special personal matters); Corporations Act 2001 (Cth) s 201G

THE WORKAROUND

Appointing a director by exercising shareholder rights



The attorney exercises the principal's rights as a shareholder

Shareholders resolve to appoint a new director in place of the incapacitated director.



Paperwork

Resolutions prepared and signed; director's consent; ASIC notified.

WORTH WATCHING

Sole director-shareholder: s 201F(2) lets a "trustee" appointed to administer property appoint a director. Whether an attorney qualifies is not settled — so take steps to appoint a director by exercising the rights of a shareholder.

Corporations Act 2001 (Cth) ss 201F(2), 201G, 203C

Can the attorney appoint themselves?

THE RISK

Arguably a conflict transaction

- An attorney may enter a conflict transaction only if the principal or the court has authorised it (s 73(1))
- Gifts limited to what the principal would make, of reasonable value (s 88)
- After capacity is lost, it's too late to add the authority — courts and tribunals may be reluctant

THE FIX

Draft it in now

- A clause allowing the attorney to appoint themselves director of companies the principal holds shares in
- A general clause authorising conflict transactions
- A separate clause dealing with gifts

Powers of Attorney Act 1998 (Qld) ss 73, 88, 118

No authority? Then do it above board

- Lucille appoints Michael as attorney — with no conflict or directorship clause
- It’s arguable Michael can’t appoint himself as director
- Some would take the risk. With Gob scrutinising every step, Michael appoints an independent director

BUT NOT FOR AN SMSF

An independent director doesn’t work for an SMSF trustee company (next slide).

The replacement must be the legal personal representative

"… the legal personal representative of a member of the fund is a trustee of the fund or a director of a body corporate that is the trustee of the fund, in place of the member …"

Superannuation Industry (Supervision) Act 1993 (Cth) s 17A(3)(b)

- "Legal personal representative" includes a person who holds an enduring power of attorney (s 10)
- So the financial attorney steps in — an independent director won't keep the fund an SMSF

THE OTHER ROUTE

A power of attorney given by the entity itself

- The trust or company grants a power of attorney — at any time, or only on certain events
- Use very broad powers, particularly if it runs a business (and often for investments too)
- For a corporate trustee: the company in its own right and as trustee of the trust
- If it holds property, arrange the appropriate registrations
- Not always needed — appointing a director by exercising shareholder rights can work if done above board

PART 5

Attorneys across state lines

How they’re appointed, and whether they’re recognised

Every state does it differently

State	Witnessing	Attorneys and back-ups	Land dealings
NSW	Prescribed witness — lawyer, Local Court registrar, or approved-course conveyancer/trustee employee (s 19). Attorneys must accept (s 20)	Joint, or several / joint and several (s 46); substitutes allowed (s 45A). No cap in the Act	Register with NSW LRS
Vic	2 adult witnesses; one authorised to witness affidavits or a doctor (s 35)	Joint, several, joint and several or majority — default joint (s 30); alternates (s 31). No cap in the Act	—
Qld	JP, C.Dec, notary or lawyer (s 31)	Joint, several, majority; alternative and successive. Max 4 joint attorneys (s 43(3))	Optional registration; governs land (s 60)
SA	At least one attesting witness authorised to take affidavits; attorney accepts (s 6(2))	Joint or several. Act is silent on substitutes	Deposit with Land Services SA
WA	2 witnesses, both authorised to take declarations — or one, plus an adult who isn't a donee (s 104(2))	Substitutes allowed (s 104B). Prescribed Form 1 provides for 2 attorneys + 2 substitutes	Lodge with Landgate first
Tas	Per approved Forms 3 / 4; attorney accepts (s 30(2)(c))	Joint, or joint and several (s 32AE(5)). No substitute provision in the Act	**Must be registered before any act has effect (s 16)**
ACT	2 adult witnesses; one authorised for stat decs (ss 19, 21(3))	Any combination, or in different circumstances (s 25) — default joint (s 26)	Register with Access Canberra
NT	Authorised witness (APP Act s 10(5); regs add accountants, health practitioners)	One or more decision makers in an advance personal plan	Register for land (APP Act s 55A)

POA Acts: NSW 2003, Vic 2014 (v007), Qld 1998, SA 1984, Tas 2000, ACT 2006 (R22); WA G&A Act 1990; NT APP Regs 2014. Land columns: registry guidance

Who decides — and the separate advance health directive

State	Personal / health decision-maker	Advance health directive (directions)
NSW	Enduring guardian — witnessed by a lawyer or Local Court registrar (Guardianship Act 1987 ss 5, 6C)	No statute — recognised at common law (Hunter and New England AHS v A [2009] NSWSC 761)
Vic	Personal matters: attorney under an EPA. Medical: medical treatment decision maker (MTPD Act 2016)	Advance care directive — instructional and values directives (MTPD Act 2016)
Qld	Attorney for personal and health matters under an EPA — only once capacity is impaired (s 33(4))	Advance health directive (s 35): directions, can appoint attorneys; doctor or NP capacity certificate (s 44(6))
SA	Substitute decision-maker appointed in the advance care directive	Same document: advance care directive (ACD Act 2013)
WA	Enduring power of guardianship — one or joint guardians, plus substitutes (G&A Act 1990 ss 110B, 110C)	Advance health directive (G&A Act 1990 ss 110P, 110Q)
Tas	Enduring guardian — must be registered	Advance care directive (from 21/11/2022; registration optional)
ACT	Attorney under an EPA for personal care and health care matters (POA Act 2006 s 13(2))	Health direction to refuse or withdraw treatment (Medical Treatment (Health Directions) Act 2006 s 7)
NT	Decision maker in an advance personal plan	Advance consent decisions in the same plan (APP Act 2013)

NSW, Qld, WA, ACT checked against the Acts listed; Vic, SA, Tas, NT from the Acts named and government guidance

Will another state recognise the EPA?

Receiving	Recognition	Legislation	Key condition
NSW	Automatic	POA Act 2003 s 25	Only to the extent a NSW EPA could confer the power
Vic	Automatic	POA Act 2014 s 138	Includes instruments in the nature of an EPA
Qld	Automatic	POA Act 1998 s 34	Only to the extent a Qld EPA could give the power
SA	Automatic	POA and Agency Act 1984 s 14	Origin-law limits carry over
WA	**SAT order**	G&A Act 1990 s 104A	Must correspond sufficiently in form and effect
Tas	**Registration**	POA Act 2000 ss 16, 42, 43	No act has effect until registered
ACT	Automatic	POA Act 2006 s 89	Not revoked by loss of capacity; not irrevocable
NT	Automatic (scheduled)	APP Act 2013 s 88; POA Act s 6A	Registration needed for land dealings (APP Act s 55A)

Each Act as listed; Qld s 34 checked against reprint current from 28/04/2026

Will another state recognise the appointment?

Receiving	Recognition	Legislation	Key condition
NSW	Prescribed instruments	Guardianship Act 1987 s 6O; Reg cl 8	Listed interstate instruments only
Vic	Personal matters via EPA	POA Act 2014 s 138	Medical treatment decision maker: no provision located — to verify
Qld	Via EPA; health docs if prescribed	POA Act 1998 ss 34, 40	Only to the extent a Qld instrument could contain it
SA	Declared instruments	ACD Act 2013 s 33; Regs reg 12	Some provisions void in SA (s 33(3))
WA	SAT recognition	G&A Act 1990 ss 110O, 110ZA	Tribunal order needed
Tas	Registration	G&A Act 1995 s 81A	Declared corresponding law, and must be registered
ACT	Automatic	POA Act 2006 s 89	Expressly includes guardianship documents
NT	Scheduled instruments	APP Act 2013 s 88	Subject to NT excluded matters (reg 9)

Each Act and regulation as listed; Vic medical treatment decision maker recognition not confirmed

PRACTICAL TRAPS

Relying on an interstate EPA

Valid where made

Recognition never cures a defect under the law of the place it was made.

“To the extent” limit

A power valid at home but unavailable locally doesn’t operate locally.

Practitioner’s certificate

NSW, SA and Tas give evidentiary weight to a lawyer’s certificate of compliance.

WA needs an order

Apply to SAT — allow time and evidence of the original instrument.

Registration and land

Tas: registration first. NT: before land dealings. Qld: optional, but governs land (s 60(3)).

Different architecture

Combined vs split instruments can mean only part is recognised.

PART 6

And on death

What actually passes?

ON DEATH

The will doesn’t give away the trust



Trust assets aren’t estate assets

They stay in the trust. The will can’t direct them.



What does pass: control

Shares in the trustee company, and the appointor role where the deed allows it.



And what the trust owes

Loan accounts and unpaid entitlements owed to the deceased — like Julie Rafter’s $500K.



Sole director-shareholder dies

The personal representative may appoint a director (s 201F(2)). Until then, decisions can stall.

TIMING MATTERS

Get the documents in place — in time

- A plan agreed in a meeting but not signed before death or loss of capacity is not a plan
- Deed variations, constitution changes and appointor nominations take time — start early
- After death, executors need the grant, share transfers and ASIC updates done promptly

PRACTICE POINT

Delay is when the default rules — and the family dynamics — take over.

ON DEATH

Assets in another state

- Land is dealt with under the law of the state where it sits
- The executor may need the grant resealed in each state where assets are held
- In Queensland, grants from other Australian states, New Zealand and the UK can be resealed by the Supreme Court

PRACTICE POINT

Check each state’s rules and registry practice before the executor deals with interstate assets.

DEATH OVERSEAS

When the death certificate isn’t Australian

Getting the certificate

Issued under the foreign country’s process and timeframes — it can take weeks.

Translation

A certificate not in English will generally need a translation by a NAATI-certified translator (National Accreditation Authority for Translators and Interpreters), often with the translator’s affidavit.

Authentication

The registry may want the document apostilled or otherwise authenticated — check before lodging.

BUILD IN TIME

Overseas paperwork can add weeks or months before the executor can even apply for a grant.

TAKEAWAYS

Nothing really is a simple estate plan

- Read the trust deed: trustee, appointor succession and default beneficiaries
- Decide how much to hardwire — recommended when circumstances require, not automatically
- Draft EPAs with directorship, conflict and gift clauses — it’s too late after capacity is lost
- Check how attorneys are appointed and recognised in each state before relying on them
- Remember: the will passes control of the trust, not its assets — and timing matters

Let's chat

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Information provided is general in nature; precise application depends on specific circumstances.