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# GLOSSARY OF TERMS
## Estate Planning

### Advanced Health Directive (AHD)

An Advance Health Directive or AHD enables a person to make decisions now about the treatment they would want (or not) to receive if they ever became sick or injured and were incapable of communicating their wishes.

Treatment includes medical, surgical and dental treatments, including palliative care and life-sustaining measures.

An AHD would only come into effect only if applied to the treatment a person required and only if they were unable to make reasoned judgements about a treatment decision at the time that the treatment was required.

An AHD takes precedence over an Enduring Power of Guardianship meaning that even if a person had an enduring guardian, a doctor would be required to follow the person's wishes outlined in their AHD (except in very limited circumstances, such as where new applicable treatments exist that did not exist at the time the AHD was made).

Since March 2023, an AHD must be completed by a person in collaboration with their general medical practitioner utilising a form that can be downloaded from the website https://www.health.wa.gov.au/~/media/HWA/Documents/Healthy-living/End-of-life/AHD-Guide.pdf

### Appointor of Trust

The person or persons expressed in a Trust Deed who has the effective 'control' of a discretionary or family trust due to their power to retire or appoint the Trustee of the Trust. Discretionary or Family Trust Deeds will generally include a provision whereby you (if you hold the office of Appointor) can nominate a person or persons as your substitute Appointor with all the same powers, authorities and discretions conferred upon that office by the Trust Deed, under a Deed made during your lifetime or by your Will.

### Binding Death Benefit Nomination ("BDBN")

As superannuation is not a personal or estate asset, it does not automatically form part of a deceased's estate. The trustee of the super fund will generally pay a deceased's superannuation death benefit in accordance with the governing rules of the superannuation fund and relevant law.

Superannuation trustees generally have discretion who to pay superannuation death benefits to. Such discretion can cause problems (such as unforeseen tax consequences, or payments made against the perceived wishes of the deceased by a capricious trustee) and having a correctly drafted binding death benefit nomination or BDBN is a way to override this trustee discretion.


Suite 8, Level 2, 11 Ventnor Ave, West Perth WA 6005 PO Box 918, West Perth WA 6872
t +61 8 9322 3842 e admin@bmlegaladvisors.com.au ABN 85 621 980 523
www.bmlegaladvisors.com.au

BDBNs are legally binding instructions from a fund member to the trustee about who is to receive their superannuation benefit in the event of death.

For a BDBN to be binding, it must be "valid" under the terms of the fund and law. One of the legal requirements is that only superannuation "dependants" can be nominated. "Dependants" (subject to circumstances) include: spouses (including de facto, opposite and same-sex); children (subject to certain age requirements and including adopted or ex-nuptial children); any person who is a financial dependent on the member; any person in an interdependency relationship with the member; and a member's a legal personal representative (i.e. the executor of the member's Will).

The requirements for BDBNs can be highly prescriptive and rely on the provisions of each fund deed and the law. As even minor errors can invalidate a BDBN, it is essential to take legal advice before preparing a BDBN.

**Corporate Trustee** means a company established for the principal purpose of administering a Discretionary Trust or Family Trust and generally controlled by the Director/s of that Company. The assets held by the Corporate Trustee are assets of the underlying Discretionary Trust or Family Trust and not assets of the Corporate Trustee.

A Will made by a Director or Shareholder of a Corporate Trustee should ideally, have provisions made for the directorship of, and/or share in, the Corporate Trustee transferred to another person in whom the Testator or Testatrix has faith and confidence that his or her substitute will act with the same responsibility and philosophy as the Testator or Testatrix themselves would act in the administration of the underlying Discretionary Trust or Family Trust.

**Discretionary Trust or Family Trust** means a legal entity recognised under Australian Law as having legal status through its Trustee to acquire and hold assets, invest and generally have the same powers as an individual has at law, with the income and capital of the Trust being distributed to certain named beneficiaries or a class or classes of beneficiaries from time to time at the absolute discretion of the Trustee who is often 'managed' or 'controlled' by the Appointor and/or Guardian of the Trust.

**Enduring Power of Attorney (EPA)**

An Enduring Power of Attorney or EPA enables a person (known as the "donor") to appoint one or more people (known as "attorneys") to make financial and/or property decisions on the donor's behalf.

An EPA can operate while the donor still has mental capacity but may be unable attend to financial matters because they are away from the country or suffer a physical incapacity.

The main difference between an EPA and an "ordinary" power of attorney is that an EPA will continue to operate even if the donor loses full legal capacity.

An EPA does not permit an attorney to make personal and lifestyle decisions, including decisions about treatment (see Enduring Power of Guardianship).

Attorneys can be appointed to act jointly (i.e. each attorney must reach agreement on any decisions they make on a donor's behalf), or jointly and severally (i.e. each attorney can act together or separately on reaching decisions).

If the donor wants their attorneys to make decisions about property they own in WA, the EPA must be registered with Landgate.

## Enduring Power of Guardianship (EPG)

An Enduring Power of Guardianship or EPG enables a person to authorise one or more persons (known as "enduring guardian(s)") of their choosing to make important personal, lifestyle and treatment decisions on the maker's behalf should they ever become incapable of making such decisions themself.

An enduring guardian could be authorised to make decisions about things such as where a person lives, the support services they have access to and the treatment they receive.

An enduring guardian cannot be authorised to make property or financial decisions on your behalf (see Enduring Power of Attorney).

A person can appoint more than one enduring guardian, but they must act jointly which means each enduring guardian must reach agreement on any decisions they make on a person's behalf.

**Executor** means the person or persons appointed by you to identify the assets and property constituting your Estate at the time of your death and with a duty to secure your Estate during administration, apply to the Court for a Grant of Probate (generally with the assistance of a Solicitor) and transfer the Estate to the beneficiaries who have a present entitlement to receive his or her inheritance without being required to fulfil an age contingency or an event contingency.

**Guardian of a Trust** means the person or persons expressed in a Trust Deed who has the right to be consulted by the Trustee and to give consent or approval to the expansion of a class of beneficiaries or, sometimes, to approve the distribution of the capital of the Trust Fund to certain beneficiaries. Discretionary or Family Trust Deeds will generally include a provision whereby you (if you hold the office of Guardian of the Trust) can nominate a person or persons as your substitute Guardian with all the same powers, authorities and discretions conferred upon that office by the Trust Deed, under a Deed made during your lifetime or by your Will (the term in this context not to be confused with, but differentiated from, the office of Guardian under an Enduring Power of Guardianship or the appointment of a Legal Guardian of infant or incapacitated persons otherwise mentioned in a Will).

**Trustee** means the person (generally the Executor) who receives your Estate or part of your Estate intended to be retained for investment for a length of time until the beneficiaries attain a predetermined age, or an event contingency occurs. The Trustee is ordinarily given reasonable powers of investment and asset retention in its current form of investment to either optimise the value of the trust fund or to make it manageable for making distribution of maintenance and education expenses during the infancy of a beneficiary. The powers and rights of a Trustee are governed by legislation but can be made either broad or narrow according to your wishes (the term in this context should not be confused with, but differentiated from, the office of Trustee of a Discretionary Trust or Family Trust).

**Testamentary Trust** means a discretionary trust (similar to a family trust) in respect to which the Will Maker appoints two or more persons as fund trustees and nominates a class of beneficiaries which might be expected to include the Will Maker's children and grandchildren who will be considered by the fund trustees to receive the trust fund in such proportions and at such time and under such circumstances as the fund trustees may in their absolute discretion determine.

Generally, the identity of the fund trustees is strategically made such that the discretion of the fund trustees in favour of the beneficiaries is exercised in a manner consistent with the Will Maker's wishes and intentions memorandum of wishes made by the Will Maker at the same time as the making of the Will. The primary benefits of a disposition of the residuary estate (the estate of the Will Maker after provision is made for any specific gifts or legacies to specific people (i.e. 'my jewellery to my daughter, Jane'; my motor vehicle to my son, William') to a testamentary trust is that the inheritance of children of the will maker at a time when those children may be suffering from the adversities of a matrimonial property settlement claim (from an estranged spouse or de facto spouse) or an insolvency claim from creditors, are protected from such claims in the event that those adversities occur at the time of the death of the Will Maker.

A testamentary trust can also be used as the mechanism by which some control is imposed upon the distribution of part of an estate to a person who may be suffering from an alcohol or drug or gambling addiction at a time when the inheritance from a parent's estate may not be utilised in the best interest of that incapacitated person.

The incorporation of a testamentary trust in the wills of persons having adult children, has become increasingly popular, with the prospect of the adversities referred to becoming more and more prevalent in our society. This commentary should not be considered to be a substitute for proper and informed legal advice applicable to your personal circumstances.