

Planning ahead: wills, power of attorney, guardianship, advanced care directives



This Fact Sheet outlines various options you may wish to consider now, to protect your interests in the future in case you become too ill to make or communicate decisions towards the end of your life. It covers several matters including managing your finances and assets, documenting your preferred care arrangements and nominating who you authorise to act on your behalf.

You may never need to enact some of these plans, but many people feel more secure about the future when they've thought through the relevant issues and recorded their decisions.

Contact details are provided for organisations who can give you guidance and/or any paperwork you will need to complete for this process of "planning ahead".

Wills

Making a Will is the only way you can ensure your assets will be distributed according to your wishes when you die. If you do not make a Will the court will appoint an administrator and distribute your assets to your spouse/defacto or your children. If there are no relatives closer than cousins, your estate will pass to the crown.

How do I make a valid Will?

For your Will to be valid:

- You must be over 18 years old;
- It must be in writing – (hand-written, typed or printed in fine);
- You and two witnesses must sign it – a beneficiary or a spouse should not be a witness as it may cancel their entitlement;
- You must have the mental capacity to understand what you are doing; and
- You must be distributing your property according to your own wishes.

You can prepare your own Will, but the legal profession urges people to have their Will checked by a lawyer or community legal centre, or through Law Access (phone: **1300 888 529**) to ensure that it is valid. If your Will is complicated for any reason, contact a lawyer who specialises in legal issues for older people.

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Will kits are for sale at most post offices and newsagents, to help you think through all the issues and prepare your Will (or a draft). You can also buy a kit from “Legal Wills Made Easy” by phoning **1800 652 265**, or visiting **www.legalwills.com.au**.

How can I make sure that my wishes are carried out?

You should appoint a person as an executor in your Will, to handle your affairs after you die. Anybody aged over 18 can be an executor: your spouse, the Public Trustee NSW, a private trustee company, friend or solicitor – but it should be someone you trust. Before nominating them you should ask whether they are prepared to be your executor, as they will be responsible for seeing that the terms of your Will are legally carried out.

You should appoint someone younger than yourself and appoint two or more executors in case one dies. Consider appointing someone who understands complexities such as financial, taxation and legal affairs. An executor can also be a beneficiary in your Will.

If I get married or divorced does that affect my Will?

If you marry after you have made a Will, the Will is automatically invalid. However, there are exceptions, so you should consult the Public Trustee NSW or a solicitor for advice.

If you divorce after you make your Will, it revokes or cancels any gift to your former spouse. It also cancels your (previous) spouse’s appointment as executor, trustee or guardian in your Will. However this does not apply if the court is satisfied that you did not intend to revoke the gift or appointment.

Options for writing your Will

The Public Trustee offers a free Will-making service conditional upon appointing them as an executor (either sole, co or substitute). Administration fees apply when you die and are deducted from your estate. It is important to confirm exactly what the fees will be before deciding whether to appoint the Public Trustee NSW (phone: **1300 364 103**).

Solicitors and private trustee companies usually charge between \$80 and \$200 for drawing up a basic Will, but the charge can increase depending on the complexity of your Will.



If you do not have your own solicitor, the community assistance service at Law Access can refer you to one (phone: **1300 888 529**). Or call the Law Society and ask for a lawyer in your area who specialises in legal matters for older people (phone: **9926 0333**).

Always ask lawyers and solicitors if they offer a discount for Seniors Card holders. The Seniors Card Discount Directory posted to members each year lists solicitors who offer discounted Will services, or check the website at **www.seniorcard.nsw.gov.au**.

Living Wills (Advance Care Directives)

A Living Will (sometimes called a Health Care Directive or an Advance Care Directive) is a document that sets out your wishes in relation to future medical treatment.

A Living Will is useful if you become unable to make – or communicate – decisions regarding your care and treatment. It usually includes items such as:

- Who you want to make treatment decisions for you;
- The treatments or medical procedures you object to; and/or
- If you are unlikely to recover, whether you want medical help to be given to prolong your life.

In NSW a Living Will is not legally binding, so doctors do not have to conform to your wishes. But Living Wills are likely to have a strong influence on health care providers when making treatment decisions.

For more information contact the Advance Care Directive Association on **0423 157 003**.

Power of attorney

Prescribed power of attorney

An ordinary (now called prescribed) power of attorney is a deed giving the person you appoint (your nominated attorney) the power to do anything legally or financially that you can do, on your behalf (e.g. pay bills, buy and sell real estate, open and operate bank accounts, enter nursing home and hostel contracts).



The person you choose to be your attorney should be someone you trust. It is useful to appoint an attorney if, for any reason, you will be unable to manage your own affairs (such as when you are travelling).

You can limit the power you give to a specific purpose (e.g. operating your bank account only) and you can appoint more than one attorney, allowing them to work separately or together.

You retain the right to manage your own financial affairs after arranging a power of attorney. However, unless you specify a commencement date, once the document is signed the attorney can act immediately on your behalf.

Note that a prescribed power of attorney becomes null and void if, for any reason, you lose your legal mental capacity.

Enduring power of attorney

This power of attorney stays in effect if you lose your mental capacity after you have appointed someone, so you must trust the person you appoint to act in your best interests.

Both the person granting the power and the person nominated as enduring attorney must sign and accept the conditions outlined in the document – your enduring power of attorney does not become operational until the appropriate documents are signed before a prescribed witness (e.g. solicitor, barrister, or registrar of the local court).

Which type?

To make a power of attorney you must be of sound mind. However, if you haven't appointed an enduring power of attorney and you are diagnosed with dementia, you are advised to appoint one as soon as possible.

A prescribed power of attorney will only be legally valid for as long as the person making the appointment is of sound mind. An enduring power of attorney will remain legally valid even though you may lose mental capacity after you appoint someone.

Powers of attorney, whether they are prescribed or enduring, can be general in the power they give to the attorney, or they can specify or limit the powers that the attorney is authorised to have when dealing with your affairs.



If you want your attorney to deal with real estate, the power of attorney will need to be registered at the Land and Property Information Division, NSW Department of Lands (phone: **9228 6666**).

See the list of contacts provided on at the end of this Fact Sheet for organisations who can provide you with advice and/or the paperwork you will need to complete.

How do I end a power of attorney?

A power of attorney ceases to operate when either the attorney or donor notifies the other that they no longer wish to continue the arrangement – the most secure way to do this is in writing. It also becomes invalid if either of you dies or becomes bankrupt.

If the power of attorney was registered you must also notify the Department of Lands if the appointment ceases.

Guardianship

A guardian is given the legal power to make important personal decisions on behalf of another adult. Your guardian may have to decide where you should live or what health care and services you need.

A guardian is appointed by the Guardianship Tribunal for adults who are unable to make decisions for themselves because of a disability (such as dementia, stroke, mental illness or a severe physical or sensory disability).

Guardianship is therefore different to a power of attorney, in that a guardian is appointed by a third party rather than being nominated by you. A guardian can be appointed – in your best interests – even if you are no longer of sound mind.

If you become ill or disabled and can no longer look after your financial and property affairs and you have not nominated an enduring power of attorney you will need to have a guardian, or a financial manager, appointed.

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How is a guardian or financial manager appointed?

The Guardianship Tribunal provides a legal system for appointing guardians and financial managers.

A family member or friend will need to go to the Guardianship Tribunal to have a guardian or financial manager appointed for you. Anyone who has a genuine concern for your welfare can apply. Your guardian or financial manager must be 18 years or over and be considered suitable by the Tribunal.

The role of a guardian is outlined above. A financial manager is similar, but their role is restricted to making decisions about your financial affairs (e.g. operating bank accounts, paying bills, investing money, or selling or buying property) if you are unable to make these decisions for yourself.

If no one suitable is available to be your guardian or financial manager, the Tribunal may appoint an independent public official called the Public Guardian (or the Protective Commissioner if your financial affairs need to be managed).

There is no charge for making an application to the Tribunal.

What is enduring guardianship?

Just like an enduring power of attorney, you can also appoint an enduring guardian who would take up this role if or when something happens to you where a guardian would be required. Some people prefer to nominate their own guardian in advance, rather than having someone applying on their behalf to the Guardianship Tribunal.

You can appoint an enduring guardian yourself, in writing. Because of the appointment's enduring nature, the document must be witnessed by a solicitor, barrister or registrar of the local court.

For forms and further information

The Office for Ageing, within the NSW Department of Ageing, Disability and Home Care, has developed a Planning Ahead Kit which gives more detailed information and resources on enduring powers of attorney, enduring guardianship and advance health care directives. Versions of this kit are also being developed for older Aboriginal people and older people from diverse cultural backgrounds (and will be available from mid 2007).

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Copies of the standard kit are available from the Seniors Information Service (**13 12 44**).

To find a local lawyer who specialises in matters for older people, contact the Law Society (phone: **9926 0333**).

Contact your lawyer or one of the organisations listed below for more information or to get the relevant forms to appoint a power of attorney, enduring power of attorney or enduring guardian:

The Guardianship Tribunal **9555 8500** or
1800 463 928

The Benevolent Society **9339 8000**

LawConsumers **9564 6933**

(LawConsumers is a valuable source of affordable, sound information and kits on wills, guardianship, conveyancing, advanced care directives and probate).

Public Trustee NSW **1300 364 103**
www.pt.nsw.gov.au

(Visit the Public Trustee website for useful booklets on wills and powers of attorney, or call Seniors Information Service (phone: **13 12 44**) for your free copy).

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The Department of Ageing, Disability and Home Care suggests that professional advice be sought wherever necessary.

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