

Who will decide for you if you can't decide for yourself?

Think about planning ahead

MAKING OUR OWN DECISIONS

We take it for granted that we can make our own decisions about a range of issues, large and small, that affect our lives. For more complex decisions we may seek advice from others but we decide whether we follow that advice or not.

The law presumes adults have the 'capacity' to make their own decisions until that is shown not to be the case. 'Capacity' means that when making a decision you have the ability to:

- understand the facts involved
- understand the main choices
- weigh up the consequences of the choices
- understand how the consequences affect you
- communicate your decision*

You must have capacity to make decisions about:

- making a will
- buying or selling property
- taking out a loan
- investing money
- making a power of attorney
- entering a contract

If you don't have capacity to make these types of decisions they will not be legally binding.

* Definition taken from the Capacity Toolkit (a publication of the Attorney General's Department of NSW). Copies are available from The Aged-care Rights Service. Call 9281 3600 or 1800 424 079.



WE CAN LOSE CAPACITY TO MAKE OUR OWN DECISIONS

Our capacity to make decisions can be affected by illness, injury or age. The loss of our capacity to make decisions may be total or partial - we may lose capacity to make any kind of decision or we may only lose capacity to make more complex decisions. The loss of capacity may be temporary or permanent.

WHO WILL MAKE DECISIONS FOR ME IF I LOSE CAPACITY?

This will depend on whether you plan ahead. You can decide in advance who you would like to make decisions for you if you can no longer do so.

If you don't plan ahead and you lose capacity it will be too late to choose who you want to be your decision-maker. You will not have any control over who can make decisions for you.

HOW CAN I PLAN AHEAD SO THAT DECISIONS CAN BE MADE FOR ME BY SOMEONE ELSE?

The law divides decisions into 2 categories - financial and lifestyle.

Financial decisions can cover dealing with bank accounts, transferring money, paying bills, dealing with shares or buying and selling real estate.

Lifestyle decisions can be about where you should live, what services you should receive or what medical and dental treatment you might need.

In NSW there are 2 special documents you can use to appoint another person to make these kinds of decisions for you in the future.

HOW DO I APPOINT A FINANCIAL DECISION-MAKER?

To appoint a financial decision-maker you can complete a legal form called a 'power of attorney'. You can decide what powers you are going to give the person you appoint (your attorney) to manage your property and financial affairs.

There are 2 types of powers of attorney:

- A **general power of attorney** is usually given for a specific period of time (for example, if you plan to travel overseas or are going in to hospital and need someone else to manage your affairs for a short time) or for a specific purpose (for example, to sell property for you). This type of power of attorney stops operating if you lose capacity.
- An **enduring power of attorney** is the one you should use if you want to give someone power to make decisions once you can no longer do so. It contains a clause which states that you want it to continue even after you have lost capacity. You can decide if you want your attorney's power to start immediately or only if you lose capacity.

WHAT HAPPENS IF I DON'T PLAN AHEAD AND I LOSE CAPACITY?

Family members may be able to informally make some decisions for you, particularly about lifestyle decisions. However most financial decisions will need a power of attorney if you have lost capacity to manage your own finances.

Without a power of attorney your family may have difficulty accessing your bank account to pay bills. If your home needs to be sold to pay for you to enter residential aged care or somewhere else more suitable, only someone with your power of attorney has legal authority to sell your house.

There may also be a problem if there is a dispute between family members over what decisions should be made and who should make them. If you have not appointed a decision-maker in advance there will be no one with the authority to decide for you and resolve any disputes between family members.

If you have not appointed an attorney or guardian, and there is a need for one, only the Guardianship Tribunal (the Tribunal) or the Supreme Court can appoint someone to make decisions on your behalf. This can be time consuming and stressful. A family member or other person who is interested in your welfare will have to ask the Tribunal to be appointed as your financial manager and/or guardian. You will be asked to participate in the hearing of the case by the Tribunal. The Tribunal must listen to your wishes, but can override them if they think that following your wishes will not be in your best interest.

The Tribunal can decide who to appoint as your decision-maker. If there is conflict between family members the Tribunal can appoint a government official to be your financial manager (the Protective Commissioner) or guardian (The Public Guardian).

A TRUE STORY

Rose has been diagnosed with early signs of dementia. She wants to make sure that if her condition deteriorates there will be someone she trusts who can make decisions for her when she is no longer able to do so herself.

She loves her 2 children, but wants her son to make any decisions for her. She knows her eldest daughter thinks she should sell her home and move into a residential aged care facility. Rose doesn't want to do this. She has heard her son and daughter disagreeing about what should happen to her.

Rose has also lent her daughter fairly large sums of money which have not been repaid. She feels more comfortable having her son in charge of her finances if she can't manage them herself.

Rose saw a lawyer who was satisfied that although she has early dementia she still had capacity to understand what documents she needed to prepare. He helped her prepare an enduring power of attorney and an appointment of enduring guardian which gave her son the authority to act as her decision-maker when she loses capacity. The lawyer also updated Rose's will at the same time.

HOW DO I APPOINT A LIFESTYLE DECISION-MAKER?

You can appoint an **enduring guardian** to be the person who makes lifestyle decisions for you. You do this by completing an 'appointment of enduring guardian' form. You can decide what powers, or functions, you want to give to your enduring guardian.

You should get help from a solicitor to complete an enduring power of attorney and an appointment of enduring guardian form, and to give you detailed advice about your options, what powers to give to the attorney and guardian and the legal consequences of making these appointments.

Both documents must be witnessed by a barrister, solicitor or Registrar of the Local Court (a Local Court Registrar can't complete the forms or give you legal advice). That person must also sign a certificate stating that they have explained the effect of the documents to you and that you understood their effect. Your attorney must accept the appointment by signing the form.

Both of these documents stop operating after you die, and any Will you have made will then begin to operate.

WHO CAN MAKE DECISIONS ABOUT MY MEDICAL TREATMENT?

By law doctors must get consent from their patients to any proposed treatment. If you are unable to give your consent the doctor must get consent from the 'person responsible'.

In order of priority, the 'person responsible' is either:

- your enduring guardian, if you have appointed one
- your most recent spouse or de facto, including

a same-sex partner

- an unpaid carer currently providing support to you, or
- a relative or friend who has a close personal relationship with you.

If you appoint an enduring guardian they can make decisions about what medical or dental treatment you receive if you lack capacity to give consent yourself.

You can record your wishes about the treatment you want or don't want in the future (for your enduring guardian, or if you don't appoint one, for the person who is likely to be the 'person responsible') by preparing an 'advance health care directive' (sometimes called a living will). The directive will only be used if you lose capacity to give consent to medical treatment.

For example, you can state that if you develop an illness from which there is no hope of recovery you do not consent to life-sustaining measures such as Cardio-Pulmonary Resuscitation, assisted ventilation or artificial feeding and hydration.

There is no particular form to use to make an advance health care directive. However it must be specific – it should state your preferences for treatment for a condition you have now or one you may develop in the future. You should discuss the advance health care directive with your doctor.

It should also be kept up-to-date because if it is left too long before it is needed there may be doubt about whether it still represents your wishes. Also, treatments may have changed. It should be signed and witnessed.

This advance care directive needs to be left with whoever is most likely to be in a position to be asked to give consent on your behalf.

WHO SHOULD I CHOOSE TO BE MY DECISION-MAKER?

This is a very important decision. You are the one who decides:

- if you will appoint a decision-maker
- who you appoint, and
- what powers or functions you will give them.

You should not let anyone pressure you to appoint them as your attorney. You should get independent legal advice before appointing a decision-maker. If a family member or other person takes you to their solicitor to have a power of attorney made you should insist on talking to the solicitor in private. A solicitor should be dealing directly with you and not through another person.

The relationship between you and the person you appoint as your attorney or enduring guardian is based on trust. You are giving them a lot of power over your life and your financial affairs. The person you appoint should not only be someone you trust to do the right thing by you but should be willing and able to take on the job.

You can appoint more than one person to be your decision-maker. If you do this you can appoint them so they can only make decisions together (jointly) or individually (severally). If you appoint more than one person you should be confident that they will be able to work together and be able to agree on what is in your best interests.

If you do not know anyone you feel would be suitable to make financial decisions for you, you can appoint the Public Trustee as your attorney. The Public Trustee will prepare your power of attorney for free but will charge a fee to act as your attorney. You can also appoint the Public Trustee as a substitute attorney. That means that if the attorney you appoint is unwilling or unable to act the Public Trustee can step in and make decisions for you.

HOW CAN I BE SURE MY DECISION-MAKER IS DOING THE RIGHT THING?

Attorneys and enduring guardians must act in your best interests. However their day-to-day activities are not monitored to make sure they are making the best decisions for you. While you still have capacity you can revoke (cancel) the power of attorney if you lose confidence in your attorney's ability to do the right thing by you.

However if you have lost capacity and an attorney is abusing their power (for example, if they are using their power of attorney to take your money or property) someone else with an interest in your welfare will need to do something about it. If they believe, or become aware, that your attorney is not acting in your best interests, they can apply to the Guardianship Tribunal to have the attorney's actions looked at and possibly have them removed as your attorney.

WHO DECIDES IF I HAVE LOST CAPACITY TO MAKE DECISIONS?

The person you have appointed as your decision-maker may be the person who decides when you have lost capacity. Or it may be a solicitor, doctor or community worker who has contact with you and needs to be confident you have capacity to make specific decisions.

If either you or another person disagrees with the assessment that is made about your capacity the Guardianship Tribunal may have to decide. A report from a suitably qualified doctor will be required to assist the Tribunal in making a decision.

Where to get more information

THE OLDER PERSONS' LEGAL SERVICE (A SERVICE OF THE AGED-CARE RIGHTS SERVICE)

Provides free legal advice and assistance for older people in a range of areas of law.

Tel: (02) 9281 3600 or 1800 424 079 (toll-free)

www.tars.com.au

LAWACCESS NSW

Provides free telephone legal information, advice and referrals to other services, including to your nearest Legal Aid NSW office, Community Legal Centres, private lawyers and other organisations that can help.

Tel: 1300 888 529 (cost of a local call)

TTY: 1300 889 529

www.lawaccess.nsw.gov.au



If you need an interpreter call the Translating and Interpreting Service (TIS) on 131 450 and ask them to call LawAccess NSW.

For more information about enduring powers of attorney and enduring guardianship, and about the Guardianship Tribunal process, see

www.gt.nsw.gov.au

This brochure was produced by Legal Aid NSW's Older Persons Legal & Education Program. This Program provides legal advice, assistance and information to older people in NSW. To find out more about the Program or to request an information session on this topic call (02) 9219 5000.

Copies of this brochure can be obtained online at www.legalaid.nsw.gov.au/publications or email publications@legalaid.nsw.gov.au or call (02) 9219 5028.

Legal Aid
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This brochure provides basic information only and is not a substitute for legal advice. You should see a lawyer to get advice about your particular situation.