

# Getting your affairs in order

## Information for people affected by cancer

**It's a good idea for everyone to get their affairs in order. By preparing a few important documents, you can make sure that your wishes are followed and make a difficult time easier and less stressful for your family and friends.**

“Getting your affairs in order” usually means:

- making a will
- preparing documents that will help others to make decisions for you if you are not able to make them yourself
- nominating a beneficiary for your superannuation and insurance
- sorting out legal and financial paperwork.

This fact sheet explains the key issues involved in getting your affairs in order.

### Making a will

A will is a legal document that sets out what you want to happen to your assets after you die. These assets are called your estate and may include your house, land, car, bank accounts, jewellery, clothes, household goods or investments. A will can also deal with how your debts will be paid and from what assets. A will may also say who should look after any dependent children under the age of 18. All adults should have a valid will. It's the best way to make sure that your assets are distributed in the way you would like after you die.

### Who can make a will?

Anyone aged 18 or older can make a will. You will need to have “testamentary capacity”. This means that you must:

- know and understand what a will is, as well as its nature and effect
- be able to communicate what you want to put in your will and why.

If there could be any doubt about whether you have testamentary capacity (for example, if you are taking heavy pain medicine that is affecting your thinking), it's a good idea to get a doctor's certificate.

### Why is it important to make a will?

Even if you don't own much, making a will is a good idea. Having a will makes it easier for your family and friends to make legal and financial arrangements after you die. Without a will, these arrangements can be complicated and expensive.

A will is particularly important for anyone with a family or dependants, especially if they are separated or divorced.

If you don't make a will, the law will decide who gets your property when you die, and it might not be who you would like. It may also be more expensive for your affairs to be dealt with if you die without a will. This is because the fees to obtain Letters of Administration (required where there is no will) are higher than the fees to obtain a Grant of Probate (where there is a will).

### How do I make a will?

There are several ways to make a will.

- **See a lawyer** – A lawyer can help you draft a will. The cost of preparing a will varies. Ask around to make sure you get the best deal. If you can't afford to pay, Cancer Council may be able to arrange a lawyer to draft a will for free.
- **Use the NSW Trustee & Guardian** – This government body can help you prepare and update a will for a set fee. You can choose your own executor or choose them for independent and impartial services - see [tag.nsw.gov.au](http://tag.nsw.gov.au) for details. If you receive a Centrelink Age Pension, you may be able to have a will prepared for free.

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### Can I write my own will?

Some people buy a kit from a newsagency or post office to draft their own will. It is important to know that there are certain requirements for a will to be valid (see *What makes a will valid?* below). If you do not understand or are unclear about these requirements, using a lawyer ensures you get it right.

### What's in a will?

A will usually includes:

- who should have responsibility for carrying out your instructions (executor) – this can be a family member, friend or the NSW Trustee & Guardian
- who you want to leave your money and property to (beneficiaries)
- who you wish to look after your children if you and the other parent both die before the youngest child turns 18 (guardians)
- your wishes for funeral, cremation or other arrangements.

Before you talk to someone about making a will, think about who you would like to appoint in these roles.

Some assets such as superannuation and insurance may not form part of your estate. Benefits may be paid directly to your dependants, which means your will won't have any effect on them. For more information, see *Superannuation death benefit nominations* on page 5.



If you choose to appoint the NSW Trustee & Guardian as your executor, they will charge fees to administer the estate after you die.

### What makes a will valid?

For a will to be valid it must be:

- in writing – handwritten, typed or printed
- signed and dated on every page and witnessed by two people who are not beneficiaries in the will nor their spouses, and who are aged over 18. They will need to witness your signature and sign their own name on every page. They both need to be present at the same time with you and use the same pen with one staple through the document (and avoid taking the staple out and replacing it).



Witnessing a signature doesn't mean the witness wrote the will or read and understood what's in it. It just means that they saw the person who made the will (the testator) sign the document.

If your will does not meet these requirements, it may not be enforceable. The Court has the power to grant probate (confirm that the will is valid) or deny probate, and your property could be distributed as if you had not made a will. In exercising this power, the Court needs to be satisfied that the document sets out how you want your assets to be distributed.

It is generally a good idea to get professional assistance with making a will. This is to ensure the will is valid and that particular parts are written in such a way that they are legally correct (so that a Court will find that they are effective). It is also a good idea to have the will signed in front of the lawyer to ensure this is done correctly.

### Where should I keep my will?

Keep your will in a safe place. This can be with your lawyer or you can use the NSW Trustee & Guardian's Will Safe service for a one-off fee. Storage is free if they are appointed as your executor.

You can also keep the will with your other important documents. It's important to tell your executor where your will is kept.

### I made a will a few years ago. Do I have to update it?

It's a good idea to review a will regularly (e.g. every five years) to check it is up to date.

If you got married since you made a will, you will need to make a new will. If you got divorced, separated or had children since your last will, it may be a good idea to write a new will or have your lawyer help you make a formal addition called a codicil.

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### Can my will be challenged?

Yes. The law expects that you make “proper provision” for certain people.

These include:

- current and former spouses
- de facto partners who are living with you around the time of your death
- children
- financially dependent grandchildren
- any other financially dependent people in your household
- any person who is living with you in a close personal relationship at the time of your death.

If you don't make provisions for these people, they can go to Court and challenge (contest) your will.

The Court will consider their needs, their relationship to you and whether they contributed to your estate (e.g. as part of a marriage). If you want to leave any of these people out of your will, you should talk to a lawyer.

A will can also be challenged on the grounds that it is not valid.

### What happens if I don't make a will?

If you die without a will (called intestate) an administrator (often a relative) will be appointed to carry out similar duties to an executor and distribute your estate according to a standard formula. This may not work out the way you would have wanted.

If you do not have a will, legal procedures may be more complicated, time-consuming and expensive. This may cause greater expense and worry to your family.

### Planning ahead

Advance care planning means preparing documents now that will help your family and friends make decisions on your behalf if you are not able to make them yourself.

This includes decisions about your finances, property, medical care and lifestyle.

Advance care planning documents are used to set out your wishes and include:


- enduring power of attorney
- appointment of enduring guardian
- advance health care directive.

Like a will, you need to have capacity to make these documents. This means understanding what the documents are and communicating what you want to include in them, and why. If there could be any doubt about your capacity, it's a good idea to get a doctor's certificate to prove you have capacity.

Before making these documents, you may want to let a person or people you trust know and communicate your wishes to them.

### Enduring power of attorney

An enduring power of attorney gives another person (called the attorney) the power to make financial and legal decisions for you.



An enduring power of attorney is similar to an ordinary (or “general”) power of attorney, except that it “endures” beyond a loss of capacity. This means that if you lose consciousness, or you're too sick to make decisions, the enduring power of attorney still operates.

**What it can cover** – It can be general, or you can outline the types of decisions allowed, such as managing your bank accounts, paying bills, selling property, and dealing with government departments such as Centrelink.

The appointed person cannot make certain important decisions such as voting on your behalf, making or changing your will nor can the appointed person make decisions for you as a director of a company.

You can put limits on the attorney's power – for example, to prevent them selling a particular asset that you own.

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**Who can be appointed** – You can appoint any person you trust who is aged 18 or over as your enduring power of attorney. You can appoint more than one person if you would prefer, and you can specify that they must act jointly (make all decisions together) or severally (decisions can be made by either person).

Also, for example, you can appoint three people and specify that any two of the three are able to make enforceable decisions.

You can decide whether the enduring power of attorney begins straight away or only if you lose the ability to make decisions for yourself.

**How to make an enduring power of attorney** – Ask a lawyer to help you or download a form from the NSW Government Land Registry Services website, [nswlrs.com.au/forms/general\\_forms](http://nswlrs.com.au/forms/general_forms).

For your appointment of an attorney to be legally valid, the attorney(s) must sign the document. This signature does not need to be witnessed.

If you haven't made an enduring power of attorney and you lose the ability to make your own decisions, the Guardianship Division of the NSW Civil and Administrative Tribunal (NCAT) can appoint a financial manager to make decisions for you.

This will usually be a family member, but it may not be the person you would have chosen yourself and there could be undue costs in having to go through this process and there may be a delay.

### Enduring guardian

An appointment of enduring guardian gives another person (called the guardian) the ability to make medical and lifestyle decisions for you when you lose the capacity to make your own decisions.

**What it can cover** – It can include decisions about your medical or dental treatment, where you live, what kinds of personal services and health care you should receive. Your enduring guardian must follow your wishes. Typically, the document will provide that your appointed guardian will only be able to make these decisions on your behalf after a medical practitioner certifies that you have lost capacity.

**Who can be appointed** – You can appoint anyone aged 18 and over, except for a paid carer (a person who receives a salary or wage from you for caring for you). It's okay to appoint someone who receives a Centrelink Carer Payment or Carer Allowance – this person is not considered a paid carer.

You can appoint more than one person as your guardian, and you can specify that they must act jointly (make all decisions together) or severally (decisions can be made by either person).

**How to appoint an enduring guardian** – Ask a lawyer for help or download a form from the NCAT website, [ncat.nsw.gov.au](http://ncat.nsw.gov.au). For an appointment of an enduring guardian to be legal the signatures of yourself and any guardians must be witnessed by a lawyer or a court registrar.

If you lose capacity and you have not made an appointment of enduring guardian, the law decides who makes decisions for you. The law says that this will be your spouse or de facto if you have one; then your adult children. If you do not have a spouse or de facto, then a close friend or relative is responsible. If there's any doubt about who it should be, the Guardianship Division of NCAT will decide.

It is important to note that if you get married after having appointed an enduring guardian, this will generally cause the appointment to be automatically revoked (cancelled).



The person appointed under the enduring power of attorney cannot make medical decisions for you. For this you need to appoint an enduring guardian (see opposite).

## Getting your affairs in order



Let your family, friends and carers know your wishes.

### Advance health care directive

An advance health care directive is a document that records your wishes for your future medical care. It is sometimes called a living will.

**What it can cover** – It can include decisions about whether you want to receive artificial nutrition or hydration, whether you want to be resuscitated, or whether you want to receive antibiotics as part of your treatment.

The more guidance you give on your preferences, the more likely your family and health care providers will make decisions that respect your wishes.

If you have particular religious beliefs that affect your health care decisions, you can also record these in your advance health care directive. An advance health care directive only comes into effect if you become unable to make your own decisions, but to be valid it needs to be made at a time when you have mental capacity.

If you have appointed an enduring guardian, your guardian must comply with the advance health care directive.

In NSW, valid advance care directives must generally be respected by medical professionals. However, if it is an emergency and the medical practitioner or hospital is unaware of an advance health care directive and it is not possible to obtain consent for treatment, the medical practitioner or hospital can carry out any medical intervention they believe to be in your best interests.

### How to make an advance health care directive

– Most lawyers will help you draft an advance health care directive, although you don't have to see a lawyer and there is no requirement for it to be witnessed by a lawyer. You can also prepare one by simply writing down your wishes.

The government provides a form to complete and an information booklet at <https://www.health.nsw.gov.au/patients/acp/Pages/acd-form-info-book.aspx>

**Where to keep a copy** – You should keep a copy of your advance health care directive and give one to your general practitioner (GP), oncologist, enduring guardian and a family member or friend. You can ask for it to be placed in your medical record and for your solicitor to keep a copy.

### Superannuation death benefit nominations

Superannuation benefits do not automatically form part of your estate and are therefore not governed by your will. When a member of a superannuation fund dies, the fund usually pays out their death benefit to one or more of their dependants. This includes the preserved amount (the contributions the member made while they were working) and any insurance benefit.

You can tell your superannuation fund who you would like to receive your death benefit. You can do this by completing a death benefit nomination or a binding death benefit nomination. The binding nomination means the fund trustee must follow your wishes.

You can only nominate someone who is a financial dependant, such as a spouse, de facto partner or child. You may need to update or confirm binding nominations every three years, depending on fund rules. Contact your superannuation fund for a nomination form.

If you have another life insurance policy (not connected to your superannuation account), you will need to nominate the beneficiary of that policy separately. Similarly, life insurance will generally be separate to your estate and not governed by your will. Contact your insurer to nominate the beneficiary of that policy separately.



Many superannuation funds offer life insurance as a default option. See the *Superannuation and cancer fact sheet* for details.

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### Organising your paperwork

It's a good idea to have all of your paperwork in the one place. This will make it easier if, for example, you need to be in hospital for a long time and a family member has to help you with financial and legal matters.

Important documents to keep together might include:

- birth, marriage and divorce certificates
- bank and credit card information
- share and other investment details
- Centrelink and Medicare details
- superannuation and insurance information
- funeral information
- house title/lease documents
- passport

### Where to get help and more information

- Cancer Council **13 11 20** for Information and Support
- NSW Civil and Administrative Tribunal – [ncat.nsw.gov.au](http://ncat.nsw.gov.au)
- NSW Trustee and Guardian – [tag.nsw.gov.au](http://tag.nsw.gov.au); **1300 364 103**

#### Note to reader

This fact sheet provides general information and is not a substitute for legal or financial advice. You should talk to a professional about your specific situation.

#### Cancer Council NSW

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For information and support on cancer-related issues, call Cancer Council **13 11 20**. This is a confidential service.