Cancer Council

LEGAL & FINANCIAL fact sheet

Planning ahead

Wills, Power of Attorney and Enduring Guardian documents

Planning ahead means preparing legal documents that tell your family and friends what you want to happen at the end of your life, or if you are not able to make your own decisions. By preparing a few documents, you can make sure your wishes are followed and the process is easier, cheaper and quicker for your family at a difficult time.

Planning ahead, or "getting your affairs in order", usually means:

- making a Will
- preparing documents that will help others to make legal and care decisions for you if you are not able to make them yourself
- nominating a beneficiary for your superannuation and insurance – the person or organisation you would like to be paid your superannuation as well as any life insurance
- leaving detailed instructions for your funeral, and where those taking care of your affairs can find the legal and financial paperwork.

This fact sheet explains the key things to consider.

Making a Will

A Will is a legal document that sets out what you want to happen to your belongings after you die and chooses the person or people you want to carry out your wishes. The assets you leave behind are called your estate. These may include property, land, cars, bank accounts, shares, cryptocurrency, jewellery, clothes, household goods and investments. A Will may also name the person you would like to look after any dependent children under the age of 18. This person is called a Testamentary Guardian (see page 3). It's a preference only and is not legally binding.

It's a good idea for all adults to have a valid Will, whether they have cancer or not.

Who can make a Will?

Anyone aged 18 or older can make a Will but you need to have "testamentary capacity" or it will not be valid (legal). This means you must be able to do the following:

- know and understand what a Will is for – to distribute your assets after your death
- recall the assets that make up your estate and what they are worth
- recall your family and friends who might have a claim to be provided for in your estate
- be free from a mental condition that impacts the way you choose to leave your estate.

If there are any concerns around whether you have testamentary capacity (for example, if you are taking heavy pain medicine that is affecting your thinking or you have been diagnosed with dementia), it's a good idea to get a doctor's certificate immediately before signing your Will.

Why is it important to make a Will?

Even if you don't own many assets, having a Will makes it easier, cheaper and quicker for your family and friends to make legal and financial arrangements after you die, such as closing bank accounts and working out how your debts will be paid. If you don't have a Will, these practical arrangements can be complicated and expensive for those left behind (see page 3 for more information on this).

Having an up-to-date Will is particularly important if you have a family or dependants, especially if you are separated, divorced or have a blended family. If you don't make an up-to-date Will when your life circumstances change (see page 3 for more), your assets may not go to the people you would like them to go to. If there is no Will, the law decides who your assets go to and again, this may not work out the way you would have wanted.

How do I make a Will?

There are many ways to make a Will. Here are the main ways:

Seeing a lawyer

A lawyer can help you draft and sign a Will. The cost varies depending on the lawyer and how complex your Will, family circumstances and assets are. Ask people you trust for recommendations. If you are not able to pay, Cancer Council's Legal Referral Service may be able to arrange a lawyer to draft a Will for free.

Contacting the Public Trustee and/or Guardian in your state or territory

These government organisations can help you prepare or update a Will for a fee. You can choose your own Executor (the person who will manage your estate) or have them act as your Executor for a fee. If you get a Centrelink Age Pension, you may be able to have a Will prepared for free.

Setting up an online Will

There are a number of online platforms, such as Safewill, that allow you to write your own Will for a small fee, but they may not be suitable for your circumstances.

What is in a Will?

A Will usually includes the following:

- The person or people you choose to carry out your wishes (they are called the Executors) – this can be a family member, friend, your lawyer or the Public Trustee or Guardian in your state or territory. If you choose your lawyer or a Public Trustee or Guardian, they will usually charge fees to manage the estate after you die.
- The person or people you want to leave your belongings to (they are known as the beneficiaries).
- Who you want to look after your children if they are under the age of 18 (see page 3).

Before you make a Will, think about who you would like to choose for each of these roles. Your Will can also include your wishes for the funeral, cremation or burial, or any other arrangements.

Some of your assets, such as superannuation and insurance, are not part of your estate (see page 4 for more information).

Can I write my own Will?

Some people buy a Will kit from a newsagency or post office to write their own Will. For a Will to be valid, there are certain things it has to include. If you do not understand or are unsure about any of these requirements, using a lawyer is a way to make sure you get it right.

What is a valid Will?

For a Will to be valid (legal), it must be:

- created when you are of sound mind
- in writing – handwritten, typed or printed
- signed and dated on every page
- witnessed by 2 people who are not beneficiaries in the Will (in some states, the beneficiaries' spouses may also not be witnesses), and who are aged over 18
- only stapled once, with no staples removed.

If your Will does not meet these requirements, it may not be valid (legal). The court has the power to grant or deny probate (confirm the Will is valid). If the court denies probate, your property could be divided up as though you had not made a Will (this is called intestacy).

What do your witnesses need to do?

- Your witnesses need to witness (see) 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 as you.
- Witnessing a signature does not mean the witness wrote the Will, agreed with or even read and understood what was in it. It just means they saw the person who made the Will sign it.
- You do not need to witness the Will in front of a lawyer, but it's a good idea to do this to make sure it's done correctly.
- Any changes made to the Will (e.g. handwritten changes to a printed document) should be initialled by you and your witnesses. If you make further changes after the Will is signed and witnessed, these must be dated and witnessed.

Where should I keep my Will?

You should keep the original copy of your Will somewhere safe. This can be with your lawyer or you can use the Public Trustee or Guardian's storage service in your state or territory. The NSW Trustee and Guardian's WillSafe service has a one-off storage fee. Storage is free if you also choose it to manage your estate (see page 2).

You can also keep your Will in any safe place you choose. It's important to tell your Executor where your Will is so they know where to find it after your death. After a person dies, their Will needs to be sent to the court to apply for probate (confirm it's valid), so it's important you keep it safe.

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

It's a good idea to review a Will every few years to check it's up to date. Major life events, like marriage, separation, divorce, having children and buying or selling assets, may impact your Will. It may be a good idea to write a new Will or have your lawyer help you make formal additions, called codicils, as these life events happen.

Can my Will be challenged?

The law expects you to give money or assets to certain people in your Will. This is called making "adequate provision". Your Will can be challenged (contested) if these people believe it does not do this.

In most states and territories these people include:

- current and former spouses
- de facto partners at 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 do not give these eligible people anything from your estate in your Will, or you only give them a small amount of money or assets, they can go to court and challenge it. When the court is considering whether your Will has adequately provided for this person, it will look at factors such as this person's personal and financial circumstances and needs, their relationship to and dependence on you, and whether they contributed to your estate (e.g. as part of a marriage).

The court will also consider the estate's value, as well as any other people you had a duty to provide for and their circumstances. If you do not want to provide for any of these eligible people in your Will, you should talk to a lawyer.

A Will can also be challenged for a few other reasons, for example if it is not signed correctly, if the wording is unclear, or if you did not have testamentary capacity (see page 1) when you signed it. There are some differences between the states and territories as to who can challenge your Will, so you may need to get advice.

What happens if I have no Will?

If you die without a Will (this is called dying intestate), an Administrator (often a family member or another person entitled to the whole or part of your estate, or the Public Trustee in your state) can apply to be allowed to carry out similar duties to an Executor. If their court application is successful, they can then divide up your estate according to the law of intestacy, which includes a list of people that may get assets from your estate depending on your circumstances. This may not work out the way you would have wanted.

- For more information on this, see the *Estate administration* fact sheet.

Who is a Testamentary Guardian?

If you are a parent, you can write down in your Will who you want to look after your children. The person you choose to look after your children is known as the Testamentary Guardian. A Testamentary Guardian is generally included so you can decide what happens if:

- both you and the other parent die before the child turns 18
- you do not want the surviving parent to look after the child.

Even if you name a Testamentary Guardian, this is only your preference; it is not legally binding. Usually, the surviving parent automatically becomes

the child's Guardian, unless there are exceptional circumstances or there are already court orders in place.

If you would like someone who is not the surviving parent to care for your children after you die, you may need to get formal court orders. If parents cannot agree on what contact they will have with the children, you may want to have Consent Orders approved by the Federal Circuit and Family Court of Australia to have a formal arrangement about who will look after the children.

If someone who is not the surviving parent wants to look after the children, they can ask the court for orders to override the surviving parent. The court then decides, based on the child's welfare, who should care for the child.

If you have named a Testamentary Guardian in your Will, the court will take this into account. But the court has the power to choose a different Guardian if it thinks this is necessary.

If there are already orders that the child is to live only with the parent who has died, the surviving parent has no automatic right to be the Guardian. In this situation, the Family Court will make a decision based on the child's best interests.

Nominate who will get your super

Superannuation benefits are not automatically part of your estate, so they are not covered by your Will. When a superannuation fund member dies, the fund usually pays out their death benefit to one or more of their dependants. This payment includes the preserved amount of super (the contributions the member made while they were working) as well as any insurance benefits.

You can tell your superannuation fund who you want to get your death benefit by completing a binding or non-binding death benefit nomination. The binding nomination means the fund trustee must follow your wishes. You can only choose someone who is a financial dependant, such as a spouse, de facto partner or child, to be paid your death benefit. You cannot choose a sibling or friend.

If you have no partner or children, you can nominate a "legal personal representative" (usually the Executor or Administrator), who must divide up your death benefit according to your Will. If you do not make a death benefit nomination, the fund will decide who should get your payment, usually your financial dependants or legal personal representative.

Depending on your fund's rules, you may need to update or confirm a binding nomination every 3 years. Contact your fund for a nomination form and make a note of whether your nomination is binding or needs to be updated every 3 years.

If you have another life insurance policy (not connected to your superannuation account), you will need to choose the beneficiary of that policy separately. Life insurance is generally considered separate to your estate and is not covered by your Will. Contact your insurer to choose the beneficiary.

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

Who can make decisions on your behalf?

A Will only takes effect after your death, so it's also a good idea to prepare documents that will help your family and friends make decisions on your behalf if you are not able to make them. This includes decisions about your finances, property, medical care and where you will live.

Depending on where you live, these documents can include:

- Enduring Power of Attorney
- Appointment of Enduring Guardian
- Advance Care Directive.

In the same way as making a Will, you need to have the mental capacity to make these documents. This means you need to understand what the documents are and be able to communicate what you want in them and why. Before making these documents, you need to check the people you are choosing to make these decisions accept their roles. It's a good idea to explain your wishes to them as well.

Choose who can manage your money and property

Having an Enduring Power of Attorney gives another person (the Attorney) the power to make decisions for you on legal, financial and property issues. In some states, it also gives them the power to make health, medical and lifestyle decisions for you.

What it can cover – It can be general, or you can list the types of decisions you will allow, such as managing your bank accounts, paying bills, selling property or dealing with government services such as Services Australia.

The Attorney cannot make certain important decisions for you such as voting, making or changing your Will, or making decisions for you as a director of a company.

You can put limits on the Attorney's power – For example, to stop them from selling a particular asset that you own or giving your assets away as gifts.

Who can be your Attorney – You can choose any person you trust who is aged 18 or older as your Attorney. You can choose more than one person if you want, and you can specify whether you would like them to act jointly (make all decisions together) or severally (decisions can be made by either person).

You can also choose a substitute Attorney if the original Attorney is unable to act (for example, if they die or are cannot be contacted). You can decide whether the Attorney begins straightaway or only if you lose the ability to make decisions for yourself.

If you choose more than one Attorney, it's a really good idea to make sure they can work together. Choosing 2 or more people who are unlikely to agree with each other may lead to arguments and slow things down when decisions need to be made quickly.

How to make an Enduring Power of Attorney – Ask a lawyer to help you or download a form from your local government website (e.g. the NSW Land Registry Services).

An Enduring Power of Attorney is similar to an ordinary Power of Attorney, except that it endures (lasts) beyond a loss of capacity. This means that if you lose mental capacity, or you're too sick to make decisions, the Enduring Power of Attorney will continue until you die or regain capacity.

Depending on where you live, there are different witnessing requirements. Generally, you need 1 or 2 witnesses, as well as a lawyer or Justice of the Peace, so it's best to seek legal advice when putting this document together.

If you haven't made an Enduring Power of Attorney and you lose the ability to make your own legal and financial decisions, the Civil and Administrative Tribunal in your state or territory can choose 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. If there is no-one suitable to act, or those people cannot agree on a decision, the tribunal may appoint the Public Guardian or Trustee in your state or territory, which could include fees.

Medical and lifestyle decisions

You can choose someone (known as the Enduring Guardian or Attorney) to make medical and lifestyle decisions for you when you lose the capacity to make your own decisions. There are different documents in different states and territories that cover these decisions (see page 6 for the full list).

What these documents can cover – These documents can include decisions about your medical or dental treatment, where you live or what kinds of personal services and health care you would like. Your chosen decision maker must follow your wishes. The document will usually say they will only be able to make these decisions for you after a medical practitioner certifies you have lost capacity.

Who you can choose – You can choose anyone aged 18 and over to make these decisions, except for a paid carer (a person who gets a salary or wage for caring for you). It's okay to choose someone who gets a Centrelink Carer Payment or Carer Allowance – this person is not considered a paid carer.

You can choose more than one person to make these decisions, and you can choose if you would like them to act jointly (make all decisions together) or severally (decisions can be made by either person). You could also choose a substitute if the original person is not available (e.g. if they die or are uncontactable). Again, if you choose more than one person to act jointly as your Attorneys or Enduring Guardians, it's important they can work together to make decisions.

How to draw up a document – Ask a lawyer for help drawing up the document or download the form from your local government website (e.g. NSW Land Registry Services). Depending on where you live, there are different witnessing requirements. Generally, you need 1 or 2 witnesses, as well as a lawyer or Justice of the Peace, so it's best to get legal advice when putting the document together.

If you lose capacity and you have not chosen an Enduring Guardian or Attorney, your next of kin might be able to make some decisions for you.

However, sometimes there are disagreements about who should be making the decisions, or about what should happen if the next of kin cannot agree. Choosing someone to make decisions will remove any uncertainty. If you have not chosen an Enduring Guardian or Attorney and there's any doubt about who can make decisions after you have lost capacity, your family might need to apply to the Civil and Administrative Tribunal in your state or territory for them to decide.

If you get married after choosing an Enduring Guardian or Attorney, and the person you have chosen is not your spouse, this will generally mean the appointment is automatically cancelled.

Enduring Power of Attorney and Enduring Guardian

These documents may have different names and cover different things depending on where you live.

State	Legal, financial and property decisions	Personal/lifestyle decisions	Health/medical decisions
ACT	Enduring Power of Attorney	Enduring Power of Attorney	Enduring Power of Attorney
NT	Advance Personal Plan	Advance Personal Plan	Advance Personal Plan
NSW	Enduring Power of Attorney	Appointment of Enduring Guardian	Appointment of Enduring Guardian
QLD	Enduring Power of Attorney	Enduring Power of Attorney	Enduring Power of Attorney
SA	Enduring Power of Attorney	Advance Care Directive	Advance Care Directive
TAS	Enduring Power of Attorney	Appointment of Enduring Guardian	Appointment of Enduring Guardian
VIC	Enduring Power of Attorney	Enduring Power of Attorney	Medical Treatment Decision Maker
WA	Enduring Power of Attorney	Enduring Power of Guardianship	Appointment of Enduring Guardian or Advance Care Directive

Make sure you let your family, friends and carers know all your financial, medical and legal wishes. That way, no-one is unclear about what you want and there will be no disagreements after you die.

Making an Advance Care Directive

An Advance Care Directive is a document that records your wishes for your future medical care when you are unable to make your own decisions. It's sometimes called a living Will and it works differently in different states and territories.

What it can cover – It can include specific decisions about your care, such as whether you want to be fed or hydrated with tubes, whether you want to be resuscitated, or whether you want antibiotics as part of your treatment.

The more guidance you give in your document, the more likely it is that your family and health care team will make decisions that respect your wishes and values.

If you have religious beliefs that affect your health care decisions, you can record them in your Advance Care Directive. The document only comes into effect if you become unable to make decisions, but to be valid, you must have had legal decision-making capacity when you prepared it.

If you have chosen an Enduring Guardian or Attorney, they must do what the Advance Care Directive says, so it's important to discuss the document with them so they know about your choices.

Advance Care Directives must generally be respected by medical professionals. But if it's an emergency, or the medical practitioner or hospital is not aware of your Advance Care Directive and it's not possible to get consent for treatment, they can carry out any medical intervention they believe is in your best interests.

How to make an Advance Care Directive – Most lawyers can help you draft an Advance Care Directive, but you do not have to see a lawyer and it does not have to be witnessed by a lawyer.

You can find the Advance Care Directive form on the government website in your state or territory, or you can simply write down your wishes. Members of your health care team (such as your doctor or oncologist) can also support you with this.

Who should have a copy – You should keep a copy of your Advance Care Directive with your other paperwork (see below) and you should also give a copy to your general practitioner (GP), oncologist, Attorney or Enduring Guardian and a family member or friend. You can also ask for the document to be put in your medical record and/or for your lawyer to keep a copy.

Organising your paperwork

Safe place

It's a good idea to keep all your paperwork in one safe place, so it will not get lost or destroyed. 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.

Documents

Important documents to keep together might include:

- birth, marriage and divorce certificates
- bank and credit card information
- shares and other investment details, especially cryptocurrency, that cannot be accessed without the correct information
- Centrelink and Medicare details
- superannuation and insurance information
- funeral information
- lease documents
- passport
- records or details of any loans owed to or by you
- passwords, social media accounts etc.

Commonly asked questions

Can an Executor also be a beneficiary and/ or Power of Attorney?

Yes, an Executor or Power of Attorney can also be listed as a beneficiary of someone's estate.

What happens if I own a property with someone else?

Property can be co-owned by either joint tenants or tenants in common. Joint tenants have mutual interests in a property. When one of them dies, the property will automatically pass to the surviving joint tenant and it will not be part of their estate. But if someone successfully challenges your Will, in some states, assets that are held as joint tenants might be added to your estate.

Tenants in common means that 2 or more people co-own a property in defined shares that they can pass on to whoever they want to. If one tenant in common dies, their share of the property does not automatically pass to the remaining owners but to the people they leave their share of the property to in their Will.

If you're not sure whether you hold a particular asset as joint tenants or as tenants in common, check with your lawyer or buy a property or asset search.

What happens if I have assets interstate or overseas?

If you have interstate or overseas assets, you may need to take extra steps to manage them in the relevant state or country. It's a good idea to get legal advice when creating your Will to make sure it will be valid (legal) in both places.

Where to get help and information

Call Cancer Council on 13 11 20 for information and support and/or for a referral into available relevant Legal Referral Services (means-tested services for cancer patients only). See the following tables to locate your local Law Society and Legal Aid websites.

Law Society websites – find a local lawyer

ACT	actlawsociety.asn.au/find-a-lawyer
NSW	lawsociety.com.au/register-of-solicitors
NT	lawsocietynt.asn.au/index.php/current-nt-legal-practitioners/
QLD	qls.com.au/Register-of-solicitors
SA	lawsocietysa.asn.au
TAS	lst.org.au/
VIC	liv.asn.au/referral
WA	lawsocietywa.asn.au/services/find-a-lawyer/

Legal Aid websites

ACT	legalaidact.org.au
NSW	legalaid.nsw.gov.au
NT	legalaid.nt.gov.au
QLD	legalaid.qld.gov.au/Home
SA	lsc.sa.gov.au/cb_pages/legal_advice.php
TAS	legalaid.tas.gov.au
VIC	legalaid.vic.gov.au
WA	legalaid.wa.gov.au

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Note to reader
Always consult your doctor about matters that affect your health, and your financial adviser or financial counsellor about matters concerning your finances, and a lawyer about legal matters. This fact sheet is intended as a general introduction to the topic and should not be seen as a substitute for medical, legal or financial advice. You should obtain independent advice relevant to your specific situation from appropriate professionals. Laws, regulations and entitlements that affect people with cancer may change. While all care is taken to ensure accuracy at the time of publication, Cancer Council Australia and its members exclude all liability for any injury, loss or damage incurred by use of or reliance on the information provided in this fact sheet.

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Cancer Council acknowledges Traditional Custodians of Country throughout Australia and recognises the continuing connection to lands, waters and communities. We pay our respects to Aboriginal and Torres Strait Islander cultures and to Elders past and present.

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