

# Speaking for myself

Planning for later life decision making



This resource is produced by Legal Aid NSW and The Benevolent Society.

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We support Australians by offering integrated support services for children, young people, families, people with disability, older Australians and carers.

We're Australia's first charity. We're a not-for-profit and non-religious organisation and we've helped people, families and communities achieve positive change for 200 years.

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This publication is a general guide to the law. You should not rely on it as legal advice, and we recommend that you talk to a lawyer about your situation.

The information is correct at the time of printing, however it may change. For more information contact LawAccess NSW on **1300 888 529**.



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# Introduction

When thinking about your future, it is natural to assume that you will always be able to make your own decisions about your life. But have you considered what would happen to your financial and personal affairs if something were to happen that affected your decision-making abilities? If you were involved in a bad car accident, had a stroke or developed dementia due to Alzheimer's disease or other illness?

The reality is that life can be unpredictable, and despite your best efforts, things can happen which mean you may not be able to make decisions for yourself. The law calls this losing 'mental capacity'.

Rather than viewing this as a depressing subject that you'd rather avoid, you could be pro-active, taking back some control and reducing the fear associated with the unknown. Take the opportunity now to plan ahead while you are still healthy and able to do so. This is important not just for your own peace of mind, but also for your loved ones, sparing them the difficulty, anxiety and expense associated with fulfilling unplanned wishes. This booklet explains how you can do this.

If you wait until you have lost your capacity to make decisions, you will have lost the opportunity to have any control over, or say in, what happens to you or your property.

If you don't plan ahead, it could mean that people in your life who you might not have chosen may end up making decisions on your behalf, on things like where you live, what happens to your home, whether you are placed in a nursing home or what medical treatment you receive.

If there is a dispute between family members over what decisions should be made, and who should make them, there will be no one with the authority to decide for you and resolve any disagreements.

Someone may have to take legal action to sort this out. This can be time-consuming, stressful, and expensive.

The Benevolent Society and Legal Aid NSW have prepared this booklet to help you take control of later life decisions. Speaking for myself is about providing you with the information you need, to take the stress out of getting older. This booklet will show you how you can take steps to protect your interests, making sure your future is in good hands and that things are done the way you would want.

# Making a will

## What is a will?

A will is a legal document that sets out how you want the things you own to be distributed when you die. Everybody should make a will, they aren't just for people who own property or have lots of money.

Making a will can sometimes feel overwhelming or daunting because nobody likes to think of the end of their life. However, writing a will is actually a positive step you can take to:

- provide for the people you care about
- leave particular items to certain people
- appoint a person you trust to carry out the instructions in your will (your executor)
- leave any other instructions you may have (for example, about your funeral arrangements), or
- make a gift to charity if you wish.

Making a will ensures that nobody speaks for you after you pass away and that your final wishes are heard, by removing the doubts and difficulties that can arise when there is no evidence of the deceased person's wishes.

Even if you don't have a lot of money or you don't own a house, you may want to leave other valuable or sentimental items such as art works, coins, jewellery, antiques, letters or photographs to particular people. You may also have wishes for what happens to your body after you die, that you can put into your will.

After your death your property and belongings are referred to as your estate.

## **Why do I need a will?**

If you don't have a will, you don't have any say about how your estate is distributed. If you die without a will (known as 'dying intestate') your estate will be distributed to your relatives on the basis of a legal formula (called the 'intestacy rules'). This could be very different from what you wanted or intended to happen. Dying intestate can also cause complications, delays and extra costs for those you leave behind. If you die intestate and you don't have any relatives closer than a first cousin, your estate will go to the government.

A will only takes effect after you have died. If you want someone to look after or make decisions about your finances while you are still alive but become unable to do this yourself, you will need to make an Enduring Power of Attorney. (See the section Making a Power of Attorney)

## **Who can make a will?**

Anyone over 18 can make a will as long as they have mental capacity. A person with a mild intellectual disability or in the early stages of dementia may still be able to make a will if they have capacity at the time the will is made. If their capacity is in doubt, an assessment of their understanding needs to be made by an appropriate person, such as a medical practitioner, psychologist, or psychiatrist.

## **How do I make a will?**

Making a will can be a simple process that does not need to be expensive. A will must be signed and witnessed properly to be legally valid. It is also important that your intentions are expressed clearly to reduce the chance of any argument over who gets what. It is therefore best to have a solicitor, the NSW Trustee and Guardian, or a trustee company, do your will for you. While there

are do-it-yourself will kits, it is safer to get a professional to do your will to make sure it is done properly.

A professional can also advise you on any tax issues you need to take into account when drafting your will.

## **How much does it cost to make a will?**

Solicitors' fees vary and can depend on how complex the will is. You can shop around to compare how much solicitors will charge. Trustee companies charge a fee for preparing a will and fees also apply to administer your estate after you die.

The NSW Trustee and Guardian charges a set fee to make and update your will unless you are on a full Centrelink Age Pension in which case they will prepare your will for free. If you appoint the NSW Trustee and Guardian as your executor fees will apply when your estate is administered after you die. For more information on NSW Trustee and Guardian fees see [www.tag.nsw.gov.au/fees/will-fees](http://www.tag.nsw.gov.au/fees/will-fees).

## **How long will my will last?**

Your will lasts until you die, unless you change it, make a new one or revoke (cancel) it.

A marriage will also revoke a will unless the will was made anticipating that particular marriage. If you plan to marry or divorce you may need to update your will. You should get legal advice about your situation.

You should also get legal advice about updating your will if your circumstances change in other ways, for example, if children or grandchildren are born, or if your partner dies or you re-partner

## **Who should I appoint as my executor?**

The executor is the person named in your will who will be responsible for dealing with your estate after you die. This should be someone over 18 who you trust and who is prepared to take on



this responsibility. Or you can appoint a professional, such as the NSW Trustee and Guardian or a solicitor, in which case you will be charged fees. You should make sure your executor knows where your will is kept.

## **Where should I keep my will?**

Most solicitors will keep the original will safe for a client for no charge. This is the safest option because if you die and your will cannot be found, it will be assumed that you destroyed it and revoked it, making it impossible to fulfill your last wishes. You can also keep it in a safety deposit box in a bank, or in a safe place at home. The NSW Trustee and Guardian also has a document storage service called [WillSafe](#) for your will, Power of Attorney and Enduring Guardianship documents.

It is a good idea to keep a signed copy with your personal papers, with a note explaining where the original will is. You should also give a copy to the executor (in a sealed envelope if you prefer) or tell them where the original is.

## **Can my will be challenged?**

A will can be challenged on the grounds that it is not valid. The person contesting an invalid will would have to show that:

- it was not your last will (you had made another one at a later date)
- it was not properly signed and witnessed
- you did not have mental capacity when you made it (which is why it is important to make a will while you are still well and there is no question about your mental capacity)
- it was changed after it was originally signed, or
- you were forced or pressured (rather than encouraged) into making the will.

Certain categories of people can also contest a will within 12 months of your death if they believe they weren't properly provided for in the will. This is called a 'family provision claim'. Having your will made by a solicitor can lessen the chances of this happening.

Although challenges to wills get much publicity, only about 5% of wills in NSW ever get challenged in court, and only some of those are successful.

## **Can I change my will if I change my mind?**

You can change your will at any time as long as you have mental capacity. However, you cannot change your will by crossing out something in your will and initialling it, or writing something different in its place. You can make a 'codicil' (which is a separate document read alongside your will, where you can make a change to your will) which will need to be signed and witnessed in the same way as when you made your will. For the sake of avoiding any confusion, it is usually best to just make a completely new will.

## **Can I leave a gift to a charity?**

Leaving a gift in your will to a charity (a 'bequest') is a powerful way of expressing your support for a cause that is important to you. You may choose to leave:

- a residual bequest (whatever is left after all other gifts and costs have been deducted from your estate)
- a percentage of your estate
- a specific sum of money, or
- a gift of property or shares.

It is important to get legal advice to make sure this is done correctly (the charity must be correctly described) and that your loved ones are properly looked after.

# Making a Power of Attorney or Enduring Power of Attorney

## What is a Power of Attorney?

A Power of Attorney is a legal document that you can use to appoint someone (referred to as your 'Attorney') to act on your behalf – that is, to be your decision maker – in property, contractual and financial matters. In this relationship you are called the 'principal' or 'donor'.

An Attorney in this sense does not necessarily mean a lawyer or solicitor. Your Attorney may be a family member, close friend, a solicitor or the NSW Trustee and Guardian. An Attorney can't make health or lifestyle decisions for you, only financial ones.

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 to hospital. It stops operating if you lose the ability to make your own decisions (lose capacity).

An Enduring Power of Attorney will continue even after you have lost capacity. This is the one you should use if you want to give someone power to make decisions for you once you can no longer do so.

## Who can make a Power of Attorney?

Anyone over 18 can make a Power of Attorney or Enduring Power of Attorney as long as they understand what they are signing (that is, if they have mental capacity). A person with a mild intellectual disability or in the early stages of dementia may still be able to make a Power of Attorney if they have mental capacity at the time the document is made. If their capacity is in doubt, an assessment of their understanding needs to be made by an appropriate person, such as a doctor, psychologist or psychiatrist.

## **Will I lose my rights if I make a Power of Attorney?**

No, as long as you are able to make your own decisions you still have authority to deal with your property and money. You can make it clear in the document that you only want your Attorney's power to start if and when you become incapable of making your own decisions.

## **If I make a Power of Attorney will it affect my will?**

No, a Power of Attorney only operates while you are alive. It is automatically cancelled when you die.

## **What will happen if I haven't made an Enduring Power of Attorney?**

If you lose capacity and haven't made an Enduring Power of Attorney there will be nobody with legal authority to manage or make decisions about your property and finances. This could create a period of uncertainty and stress for both you and your loved ones who are trying to support you. Your family may have difficulty accessing your bank account to pay your bills for you. If your home needs to be sold (for example, to pay for you to move into residential aged care) only someone with your Power of Attorney will be able to do this.

A relative or another person may need to apply to the Guardianship Division of the NSW Civil and Administrative Tribunal (NCAT) or the Supreme Court to have a financial manager appointed for you, to ensure these decisions can be made and your finances can be looked after. This may not be the person you would have chosen.

## **How do I make an Enduring Power of Attorney?**

You will need to prepare an Enduring Power of Attorney document. You can do this by:

- going to a private lawyer
- making an appointment with NSW Trustee and Guardian, or

- purchasing a 'Prepare your own Enduring Power of Attorney and Enduring Guardianship Pack' available at post offices.

The form for an Enduring Power of Attorney is different to the one for a general Power of Attorney.

The form must be witnessed by a barrister, solicitor, registrar of the Local Court, an employee of the NSW Trustee and Guardian or trustee company, a qualified overseas lawyer or a licenced conveyancer.

That person must also sign a certificate stating that they have explained the document to you and that you understood its effect.

The person you appoint as your Attorney must also sign the form to accept their appointment before they can act as Attorney.

If you are eligible for a full Centrelink Aged Pension or equivalent the NSW Trustee and Guardian will prepare an Enduring Power of Attorney for you for free. For more information see [www.tag.nsw.gov.au/wills/make-power-attorney/what-power-attorney](http://www.tag.nsw.gov.au/wills/make-power-attorney/what-power-attorney).

For information on how to find a private lawyer or make an appointment with the NSW Trustee and Guardian see 'Where can I get legal help'.



## Georgio's story



At 52, Georgio was diagnosed with a heart condition which required open heart surgery. His doctor said that he would be unable to work for six weeks. His doctor also pointed out the risks involved in surgery.

As a sub-contractor for a construction company, Georgio had some complicated financial arrangements and was worried about the possibility of not being able to attend to them himself following surgery. Georgio had already made a will but decided that he needed to plan carefully in the event he was not able to make decisions about his finances after the surgery, or if something else happened and he lost his capacity to make decisions for himself. Georgio and his wife Madeleine went to a solicitor, because they both felt it was time to make some long term plans. Georgio gave Madeleine an Enduring Power of Attorney.

Georgio recovered fully after a few months, and the Enduring Power of Attorney remained untouched in his solicitor's file. However, if things had not gone well and Madeleine had been faced with major business decisions, the document would have enabled her to take control without needing to apply to the Guardianship Division of NCAT or the Supreme Court at a time when she already had many responsibilities.

## Who should I appoint as my Attorney?

Because your Attorney will be able to do anything you could do with your property and money, you should choose someone who is suitable, willing to take on this role, and who you trust to make these important decisions for you in your best interests.

You can appoint more than one person as your Attorney. However, you should choose people who are able to work together.

If you appoint more than one person you can appoint them so they can only make decisions together (jointly) or individually (severally). You should talk to a lawyer about what would be best in your situation. It is a good idea to appoint another person as a 'substitute' to act in case the other(s) can no longer do so (e.g. they lose capacity or die).

If you do not know anyone you consider to be suitable you can appoint the [NSW Trustee and Guardian](#) as your Attorney. They will charge a set fee to draw up a Power of Attorney unless you are on a full Centrelink Age Pension. If they do have to act as your Attorney they will charge for their services.

## Jean's story



Jean was in her early 80s and lived alone. She had two daughters. Carol lived in the next suburb and Sandra lived overseas. Jean didn't need any help, but noticed she was becoming increasingly forgetful. When she discussed this with her doctor, he arranged for tests and confirmed that her memory was getting worse. Although she wanted to stay at home for as long as possible, Jean realised that one day she might need to move to some type of supported accommodation and so her house might need to be sold.

Jean wanted to be sure that if she ever became incapable of making her own financial arrangements, they would be in the hands of someone she trusted and who could do the work involved. She told both her daughters of her intention to appoint Carol as her decision-maker under her Enduring Power of Attorney.

Sandra was upset that Carol had the Power of Attorney, fearing that this represented some kind of favouritism or that she might inherit less of the estate as a result. Jean was able to assure Sandra that it was more practical to appoint Carol, and Carol assured Jean that she would not seek to disadvantage Sandra in any way.



## **What are my Attorney's responsibilities?**

Your Attorney must:

- avoid conflicts between their interests and yours
- maintain proper records of their dealings with your money and property
- keep your money and property separate from theirs
- act in your best interest at all times, and
- not pay or give gifts or benefits to themselves or other people using your finances, unless you specifically say they can (although they can claim out-of-pocket expenses directly connected with carrying out the Power of Attorney duties).

## **What can I do if my Attorney is not looking after my affairs properly?**

While you still have capacity you can cancel (revoke) your Power of Attorney. If you have lost capacity and your Attorney acts dishonestly or improperly or is not acting in your best interests, it may be possible for the Guardianship Division of NCAT or the Supreme Court to do something about it.

Someone else who is concerned about your welfare would need to apply to NCAT or court to have the Attorney's actions looked at and possibly have them removed as your Attorney. It is better to apply to NCAT as it is cheaper, faster and less formal, but some disputes can only be resolved in the Supreme Court, which is why it is so important to choose the right person in the first place.

## **Can I change my mind?**

You can cancel your Power of Attorney at any time as long as you have mental capacity. You must let your Attorney know that you are cancelling the Power of Attorney. It is best to do this in writing so that your intention is clear to everybody. If your Attorney is not told, they can continue to deal with your finances

and property and you will be liable for any actions they take.

You must also notify your bank and any other relevant groups or businesses that the Attorney may have been dealing with.

If your Power of Attorney was made through a solicitor or a branch of the NSW Trustee and Guardian, you should speak with whoever made your Power of Attorney in the first instance.

For more information about how to change or cancel a Power of Attorney and to make an appointment with NSW Trustee and Guardian, see [www.tag.nsw.gov.au/wills/make-power-attorney/update-or-cancel-existing-power-attorney](http://www.tag.nsw.gov.au/wills/make-power-attorney/update-or-cancel-existing-power-attorney) or call 1300 10 20 30.

## **Does my Power of Attorney need to be registered?**

If your Power of Attorney will be dealing with your real estate (ie to sell, mortgage or lease a property) then your Power of Attorney must be registered with the [NSW Land Registry Services](http://www.nswlrs.nsw.gov.au) (NSWLRS). There is a registration fee.

There are 3 ways to lodge your Power of Attorney with the NSWLRS.

- Your solicitor can lodge it electronically via PEXA.
- You or your Attorney can take the completed form to the NSWLRS office at Level 30, 175 Liverpool St Sydney NSW 2000 (8.30am - 4.30pm, Mon - Fri).
- By post if you are outside the Sydney metropolitan area.

Even if you don't need to register your Power of Attorney you may still choose to do so. The advantages are that it will then be:

- on record as a public document
- safe from loss or destruction, and
- more easily accepted as evidence that your Attorney has authority to deal with your property and financial affairs.

If your Enduring Power of Attorney is registered but you later

revoke (cancel) it, you can use a 'Revocation of Power of Attorney' form to do this, available from the [NSWLRS](#). You should also register the revocation.

## **Can an Enduring Power of Attorney made outside NSW be used in NSW?**

Each state and territory have their own laws on enduring powers of Attorney. If an Enduring Power of Attorney was made in another Australian state or territory then, provided it complies with the legal requirements of that state or territory, it will be recognised in NSW. However, you should get legal advice about this.

Powers of Attorney which are made overseas can't be used in NSW.

## **Can a NSW Enduring Power of Attorney be used outside NSW?**

If you want your Attorney to be able to use your NSW Enduring Power of Attorney in another state or territory or overseas, you should make enquiries about what the requirements are in that state, territory or country. They all have different laws about powers of Attorney.

# Appointing an Enduring Guardian

## What is an Enduring Guardian?

An Enduring Guardian is someone you legally appoint to make personal, health or lifestyle decisions for you if you can no longer make your own decisions.

You can appoint an Enduring Guardian to take responsibility for making decisions such as where you live, which doctor you go to, and what medical or dental treatment and other services you receive.

It is different from an Enduring Power of Attorney which only authorises the person you appoint (your Attorney) to make decisions about your money and property.

## Who can appoint an Enduring Guardian?

Anyone over 18 can appoint an Enduring Guardian as long as they understand what they are signing (that is, if they have mental capacity). A person with a mild intellectual disability or in the early stages of dementia may still be able to appoint an Enduring Guardian if they have capacity at the time the document is made. If their capacity is in doubt, an assessment of their understanding needs to be made by an appropriate person, such as a doctor, psychologist or psychiatrist.

## What sort of functions can an Enduring Guardian have?

You can choose what type of decisions your Guardian can make for you. These are called functions. You can give your Enduring Guardian as many or as few functions as you like. Possible

functions include deciding:

- where you live
- what health care you receive
- what other personal services you receive (e.g. meals on wheels, home care), or
- to consent to medical or dental treatment for you.

You can give your Guardian directions about how to exercise the decision-making functions that you give them. For example, you can direct your Guardian to consult with a family member or close friend whenever possible.



## Ted's story



Ted was in his 60s, had never married and lived in a country town. He got on very well with his next door neighbours, Max and Ada, whom he had known for many years. Ted's only relative was his older sister, Dorothy, who lived in Sydney. On her rare visits to him, she felt it was her right to tell him what to do and how to live his life.

When Ted had a heart attack, Dorothy rang his doctor daily to say it was time Ted went to a nursing home. Fortunately, Ted made a good recovery and was able to go home. He talked to his doctor, to Max and Ada, and to a solicitor, and decided to appoint Max and Ada as his Enduring Guardians. He gave them the functions of deciding where he would live, what health care and other services he would receive, and to consent to medical or dental treatment for him. He appointed them jointly so they would have to agree on decisions they made for him.

He gave them directions that he wanted to stay at home as long as possible. However, if the time came when he was no longer able to make his own decisions, he would agree to going to a nursing home if they and his doctor thought it was necessary. He also directed that they should talk to Dorothy before making decisions. When he told Dorothy she agreed to cooperate and respect Ted's wishes.

## Who can be an Enduring Guardian?

You can appoint more than one person as your Enduring Guardian. They must be at least 18 years old and be willing to accept their appointment. You should choose someone you trust to make decisions for you in your best interests. If you appoint more than one person you can appoint them so they can only make decisions together (jointly) or individually (severally). It is also a good idea to appoint another person as an 'alternate' to act for you if the other(s) can no longer do so (e.g. they lose capacity or die).

You can appoint the same person you choose as your Attorney (in your Enduring Power of Attorney) to be your Enduring Guardian as well.

You cannot appoint a person who is providing treatment, accommodation, support or care to you on a paid basis as your Enduring Guardian. You can, however, appoint a person receiving a carer payment or allowance.

## How do I appoint an Enduring Guardian?

First discuss the appointment with your chosen Guardian(s) to make sure that they are willing to take on this responsibility if you can no longer make decisions for yourself. You should discuss the role of a Guardian with them and make sure that they clearly understand your wishes and any conditions associated with any function.

You may also wish to discuss the appointment with other significant people in your life.

You will need to prepare an Appointment of Enduring Guardian document. You can do this by:

- going to a private lawyer
- making an appointment with NSW Trustee and Guardian, or
- purchasing a 'Prepare your own Enduring Power of Attorney and Enduring Guardianship Pack' available at post offices.

You and your Enduring Guardian must sign the form and have your signatures witnessed by a solicitor, barrister, registrar of the Local Court, an employee of the NSW Trustee and Guardian or a qualified overseas lawyer.

The signatures can be witnessed by different witnesses at different times. The witnesses must also sign a certificate stating that they have explained the effect of the document to you and that you understood its effect.

You can cross out the functions you do not want your Guardian to have and add others if you wish, such as who can visit or stay with you, and when (this function needs to be specifically stated).

If you are eligible for a full Centrelink Aged Pension or equivalent, the NSW Trustee and Guardian will prepare an Enduring Guardianship document for you for free. For more information see [www.tag.nsw.gov.au/wills/appoint-enduring-guardian](http://www.tag.nsw.gov.au/wills/appoint-enduring-guardian).

For information on how to find a private lawyer or make an appointment with the NSW Trustee and Guardian see 'Where can I get legal help'.

## **What should I do with the appointment form?**

Keep the appointment form in a safe place such as with your other important papers where it can be found if needed. Tell someone close to you where it is and give a copy to your Enduring Guardian. You may also wish to give copies to other relevant people in your life and to your doctor and solicitor. The NSW Trustee and Guardian also has a will and document storage facility. See [www.tag.nsw.gov.au/wills/make-will/will-and-document-storage](http://www.tag.nsw.gov.au/wills/make-will/will-and-document-storage).

## **When does the appointment start?**

The appointment of your Enduring Guardian only starts if you become unable to make your own personal or lifestyle decisions.



Your Guardian may wish to seek the opinion of a doctor about your capacity to make your own decisions before acting on your behalf.

## **Can I change my mind?**

While you are capable of making your own decisions, you can amend or revoke your appointment of an Enduring Guardian at any time. In NSW, most Enduring Guardianship appointments are made through a solicitor or a branch of the NSW Trustee and Guardian. In the first instance, you should speak with whoever you made your Enduring Guardianship documents. For more information about how to change or cancel a Power of Attorney and to make an appointment with NSW Trustee and Guardian, see [www.tag.nsw.gov.au/wills/appoint-enduring-guardian/what-enduring-guardian](http://www.tag.nsw.gov.au/wills/appoint-enduring-guardian/what-enduring-guardian) or call 1300 10 20 30.

You will need to complete a new Appointment of Enduring Guardian if you want to appoint a new person as your Enduring Guardian.

## **What can be done if there are concerns about what my Enduring Guardian is doing?**

Anyone with an interest in your welfare can apply to the Guardianship Division of NCAT for a review of the appointment. NCAT can revoke the appointment, confirm it, change the Guardian's functions or appoint someone else to be your Guardian.

NCAT does not supervise Enduring Guardians and will only become involved if it receives an application to review the appointment or receives information indicating a review of your appointment of your Enduring Guardian may be necessary.

For more information see <https://ncat.nsw.gov.au/case-types/guardianship/review-enduring-guardianship.html> or call NCAT on 1300 006 228.

## **Can an Enduring Guardianship appointment made outside NSW be used in NSW?**

If an Enduring Guardianship appointment was properly made in another Australian state or territory, it will be recognised in NSW. This does not apply to Enduring Guardianship appointments which are made overseas.

## **Can a NSW Enduring Guardianship appointment be used interstate or overseas?**

If you want your Enduring Guardianship appointment to be used in another state or overseas, you should make enquiries in that state or country. Every state and country have different laws about Enduring Guardianship.

## Elsie's story



American-born Elsie had been living in Sydney for over 30 years. She had never married or had children. She had no family in Australia, but she had some special friends. She had been a music teacher all her life, and soon after she retired, she found out she had terminal cancer.

Elsie talked to her doctor and her friends and told them that she wanted to enjoy her music and time with her friends as long as possible. However, if the time came when she couldn't communicate with her friends and showed no pleasure in listening to music, she did not want her life prolonged in any way. She wrote in her advance care directive that, if that time came, she only wanted to be kept as comfortable and free from pain as possible.

# Decisions about my health

## Who can make decisions about my health?

While you have capacity only you can make decisions about your health. By law doctors and other health care professionals must get your consent before carrying out any proposed treatment.

If you are not able to give consent (for example, if you are unconscious or have lost your capacity through alzheimer's disease), in most cases the doctor must instead get consent from your 'person responsible'. If you have appointed an Enduring Guardian, he or she will be your 'person responsible'. Otherwise, your person responsible will be, in order, your current or most recent partner (husband, wife, de facto or same sex partner), a person caring for you, a relative or close friend.

## Advance care planning

It's therefore a good idea to discuss your wishes about future health care with your family and friends (and Enduring Guardian if you have appointed one). Otherwise, if the time comes that they need to make decisions for you, it may be hard for them to know what you would have wanted. This is called advance care planning. You can also write your wishes down in an advance care directive.

## What is an advance care directive?

An advance care directive (also called an advance care plan or a living will) is a written record of your wishes or instructions for doctors and health care workers about the treatment you want or don't want in particular circumstances in the future.

An advance care directive is only used in situations when you are

unable to communicate or have lost the ability to make medical treatment decisions for yourself.

It is a good idea to talk to your doctor when you make an advance care directive as your doctor can help you understand more about health conditions you may have and treatment decisions that may need to be made.

## **How do I write an advance care directive?**

Unlike enduring powers of Attorney and Enduring Guardianship appointments, there is no special form that you must use. However, [NSW Health](#) has an information pack which includes a form and an information booklet on the best way to document an advance care directive. NSW Health recommends that an advance care directive follow these principles:

It needs to be specific. It can include your preferences for treatment for a health condition you have now or one you may develop in the future.

1. It needs to be kept current. Your wishes may change in the future, so it is important to review your advance care directive regularly or if there is a big change in your health. It is a good idea to note on it when you last reviewed it and whether or not you made any changes.
2. You must be mentally competent. You can only make an advance care directive while you still have the mental capacity to understand the choices you are making.

It is also good to have it witnessed. You can choose who you ask to witness it.

You can make an advance care directive as part of appointing an Enduring Guardian. You can attach your advance care directive to your Appointment of Enduring Guardian form and refer to the attachment in the form itself.

## **Do doctors then have to follow my wishes?**

Yes, although there is no special legislation in NSW that deals with advance care directives. NSW Health guidelines to doctors make it clear that if an advance care directive meets the principles set out above, doctors are legally bound to follow it.

For example, you may say in your advance care directive that if you are unable to communicate with or recognise your family and there is no realistic possibility that you will ever improve or recover, you do not want CPR (cardio pulmonary resuscitation) if your heart stops, but you only want to be kept comfortable and free from pain.

Under voluntary assisted dying laws in NSW, in certain circumstances, you can authorise and direct that a medical procedure be carried out to end your life. You must be mentally capable and suffering from a terminal illness at the time. This is highly regulated, and you should discuss this with your doctor.

## **Does everyone need an advance care directive?**

No, it is up to you. Everyone is different and you may prefer to leave such decisions to your partner, a person caring for you, or a relative or close friend who knows you well and you trust to make decisions for you.

Even just talking over what you would want will at least help them to know what you would have wanted if they ever have to make such decisions for you. This is called advance care planning.

## **Is there a special form to make an advance care directive?**

No, there is no special form that you must use. You can write your advance care directive as an open letter or you can attach it to, or incorporate it into, your Appointment of Enduring Guardian form.

There is also a useful form on the [NSW Health](#) website and on the [Advance Care Planning Australia](#) website.

What is important is that however you write it, your advance care directive should meet the three points set out above.

It is a good idea to give a copy of your advance care directive to your 'person responsible', that is, the person most likely to be asked to give consent to medical treatment on your behalf. This will ensure the person knows your wishes and can act on them.

It is also a good idea to give a copy to your regular doctor (GP) so that they know your wishes as well. If you have already been treated at a particular hospital you could also ask your doctor to send your advance care directive to the hospital with a request that it be placed in your medical record.

# Where can I get legal help?

## LawAccess NSW

LawAccess NSW is a free information service run by Legal Aid NSW. Anyone who has a legal problem in NSW can contact LawAccess NSW for legal help.

Click on the Chat with us button at [www.legalaid.nsw.gov.au](http://www.legalaid.nsw.gov.au) or call **1300 888 529** between 9am and 5pm, Monday to Friday (excluding public holidays).

## Law Society of NSW

The Law Society of NSW Solicitor Referral Service can refer you to a private solicitor in your area.

Call **02 9926 0300** or visit [www.lawsociety.com.au/srs](http://www.lawsociety.com.au/srs).

## Senior Rights Service (SRS)

The SRS provides free and confidential telephone advice, aged care advocacy and support, legal advice and community information to seniors across New South Wales.

Call **1800 424 079** or visit [www.seniorsrightsservice.org.au](http://www.seniorsrightsservice.org.au).

## NSW Trustee and Guardian (TAG)

TAG prepares wills, powers of Attorney and Enduring Guardianship documents. If you are eligible for a full Centrelink Age Pension or equivalent pension this service is free. You can also appoint NSW Trustee and Guardian as your independent executor and Attorney.

They can also provide safe storage for your important planning ahead documents.

Call **1300 109 290** or visit [www.tag.nsw.gov.au](http://www.tag.nsw.gov.au) for the full range of services and brochures, or to locate your nearest branch.



# Where can I get more information?

## NSW Land Registry Services (NSWLRS)

If you want your Attorney to deal with any real estate you own in NSW, then the Power of Attorney document must be registered with the NSW Land Registry Services. Their address is Level 30, 175 Liverpool St Sydney NSW 2000.

Call **02 8776 3575** or visit [www.nswlrs.com.au](http://www.nswlrs.com.au).

## Advance Care Planning Australia

Information, advice and support about advance care planning, including a free starter pack.

Call **1300 208 582** or visit [www.advancecareplanning.org.au](http://www.advancecareplanning.org.au).

## NSW Health

Information pack about making an advanced care directive, including a form. Visit [www.health.nsw.gov.au/patients/acp/Pages/acd-form-info-book.aspx](http://www.health.nsw.gov.au/patients/acp/Pages/acd-form-info-book.aspx).

## Dementia Australia

Information, education and support for people who have dementia and their carers.

Call **1800 100 500** or visit [www.dementia.org.au](http://www.dementia.org.au).

## Guardianship Division: NSW Civil and Administrative Tribunal (NCAT)

The Guardianship Division of NCAT determines applications about adults who are incapable of making their own decisions and who may require a legally appointed substitute decision maker.

Call **1300 006 228** or visit [www.ncat.nsw.gov.au](http://www.ncat.nsw.gov.au).

## Planning ahead for Aboriginal and Torres Strait Islander people

The NSW Trustee and Guardian has resources for Aboriginal people about planning ahead.

- **Taking care of business**

This handbook is an easy to read introduction to wills, Powers of Attorney, Enduring Guardianship and advance care planning.

- **Aboriginal Wills**

This handbook provides guidance for legal practitioners advising an Aboriginal person, including about preparing culturally sensitive planning ahead documents

Visit [www.tag.nsw.gov.au/wills/make-will/wills-aboriginal-people](http://www.tag.nsw.gov.au/wills/make-will/wills-aboriginal-people).

- **Who gets my stuff when I die?**

This publication from Legal Aid NSW talks about wills, secret knowledge, funerals and other important information for Aboriginal and Torres Strait people. Order or view online at [www.legalaid.nsw.gov.au/ways-to-get-help/publications-and-resources](http://www.legalaid.nsw.gov.au/ways-to-get-help/publications-and-resources).



## Other resources

### **Rest assured: a legal guide to wills, estates and funerals in NSW**

A comprehensive resource by Rosemary Long and Trudy Coffey and published by the State Library of NSW. Copies are available at your local library or visit: [www.legalanswers.sl.nsw.gov.au/rest-assured-legal-guide-wills-estates-planning-ahead-and-funerals](http://www.legalanswers.sl.nsw.gov.au/rest-assured-legal-guide-wills-estates-planning-ahead-and-funerals).

### **Planning for the Future: People with Disability**

This resource is produced by the Australian Department of Social Services. It has help and advice for families who are planning future arrangements for the ongoing care of their family member with disability. Visit: [www.dss.gov.au/disability-and-carers-publications-articles/planning-for-the-future-people-with-disability](http://www.dss.gov.au/disability-and-carers-publications-articles/planning-for-the-future-people-with-disability)

### **Your Rights at Retirement: A guide to making decisions and navigating your entitlements in later life**

This resource is produced by the Australian Human Rights Commission. It can help you think about the decisions you should be making for the future, from setting up a retirement budget to options for aged care. Download it at: [www.humanrights.gov.au](http://www.humanrights.gov.au) or call **1300 369 711**.

### **Legal Topics for seniors**

The Legal Topics for seniors booklet is produced by Legal Aid NSW. It has information about older persons rights, housing, scams, neighbour disputes, and has helpful contact numbers of agencies and services for seniors in NSW. To view or order this or other free publications for seniors, visit: [www.legalaid.nsw.gov.au/ways-to-get-help/publications-and-resources](http://www.legalaid.nsw.gov.au/ways-to-get-help/publications-and-resources).

