

Getting your affairs in order

Information for people affected by cancer

It's a good idea for everyone to get their affairs in order, whether you have cancer or not. By preparing a few simple documents, you can make sure that your wishes are followed, and you will make things easier for your family at a difficult time.

'Getting your affairs in order' usually means:

- making a will
- preparing documents that will help others to make decisions for you if you're 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 records what you want to happen to your assets and other affairs after you die. These assets are called your estate. A will may also say who should look after any dependent children under the age of 18.

Who can make a will?

Anyone aged 18 or older can make a will, as long as they have 'testamentary capacity'. This means that they:

- understand what a will is; and
- can communicate what they want to put in their will and why.

If there could be any doubt about whether you have testamentary capacity (for example, if you are on heavy pain medication that is affecting how you think), it's a good idea to get a doctor's certificate to help prove that you have the capacity.

Who should make a will?

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. 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.

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 you are separated or divorced.

How do I make a will?

There are a number of ways to make a will.

- **Talk to an expert** – A lawyer can help you draft a will. Some people draft their own wills using kits bought from a newsagency or post office. However, there are certain requirements for a will to be valid (see *What makes a will valid?* on page 2) and using a lawyer ensures you get it right. Lawyers charge different fees to draft wills. 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 State Trustees** – This is a state owned company that can help you draw up a will. State Trustees will charge fees to prepare your will and to administer the estate after you die.

What's in a will?

Wills usually include:

- who you want to leave your money and property to (beneficiaries)

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- who should have responsibility for administering your estate (executor)
- who should look after your children if you and the other parent both die before the youngest child turns 18 (guardians).

Before you talk to a lawyer, have a 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 dependents, which means your will won't have any effect on them. For more information, see *Superannuation death benefit nominations* on page 4. Other examples of assets that cannot be left in a will include property owned as a joint tenant and assets that are held in family companies or trusts.

What makes a will valid?

For a will to be valid it must be:

- in writing – (handwritten, typed or printed)
- signed by the testator with the intention of making a will
- witnessed by two people who are not beneficiaries in the will and who are aged over 18. They will need to witness your signature and sign their own name on every page. They need to both be present at the time you make your signature.

Where should I keep my will?

Keep your will in a safe place. Your lawyer will usually hold the will for you, or you could keep it with your other important documents. It's important you tell your executor where your will is kept.

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

A will should be reviewed regularly, especially if the testator's circumstances change (e.g. upon the birth of a child, new assets being acquired or a change in relationship status). Marriage and divorce normally revoke an existing will unless contrary intention is provided in the will.

Can anyone challenge my will?

Yes. Under Victorian law, there are specified categories of people who can claim that the testator has a 'moral duty' to provide for them.

Some of these categories include:

- spouses or domestic partners at the time of death;
- children or step children under the age of 18 (and full time students up to the age of 25); and
- children with a disability

If a claim is made by a person, it is up to the court to decide if the will (or if there is no will, the law relating to intestacy) has made adequate provision for the claimant. If not, the Court may order that provision be made out of the estate.

If you are intentionally excluding any of these dependents from your will, it is important that you talk to a lawyer. At a minimum, you should record the reasons by either inserting a clause in the will or, alternatively, placing a signed statement with the will.

What happens if I don't make a will?

An administrator (often a relative) will be appointed to carry out similar duties to an executor. The law provides a formula for the distribution of assets of a person who has not left a will. This may not work out the way you would have wanted.

If you don't have a will, legal procedures may be more complicated and time-consuming. This may cause expense and worry to your family.



Witnessing a signature doesn't mean you wrote the will or have read and understood what's in it. It just means that you saw the testator (person who made the will) sign the document. It's a good idea for everyone – the testator and witnesses – to use the same pen.

If your will is not made in this manner, it may not be enforceable. The Court has the power to grant probate (i.e. confirm that the will is valid) even if it has not been executed properly under the law, provided that the Court is satisfied that the testator intended the document to be his or her will. If the Court is not satisfied, then it may deny probate, and your assets could be disposed of as if you had not made a will.

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Planning ahead

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

This includes decisions about your finances, property, medical care and lifestyle. You can use advance care planning documents to set out your wishes in relation to all of these things.

The main planning documents used in Victoria are:

- enduring power of attorney (medical treatment)
- advance health care plan/directive
- refusal of treatment certificate

As is the case with 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 identify a person or people you trust and communicate your wishes to them.

Enduring power of attorney

An enduring power of attorney gives another person (the attorney) the power to make financial and and/or personal decisions for you.

Moreover, personal decisions such as whether to consent to medical treatment, access to support services and where and with whom you live could be covered.

However, the appointed person can't make certain important decisions, like voting on your behalf or making your will.

You can also impose conditions or limitations on the attorney's power – for example, to prevent them selling a particular asset that you own.

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).

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

How to make an enduring power of attorney –

A lawyer can help you or you can download a form from the office of the Public Advocate website, <http://www.publicadvocate.vic.gov.au/>.

If you haven't made an enduring power of attorney and you lose the ability to make your own decisions, the Guardianship List of the Victoria Civil and Administrative Tribunal (VCAT) 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.

Medical enduring power of attorney

A medical enduring power of attorney gives another person the power to make decisions about medical treatment on your behalf.

The person you appoint should be someone who you trust to carry out your wishes. They will only be able to make decisions about your medical treatment if you are not able to (e.g. if you have lost capacity either permanently or temporarily).

Types of decisions they can make – You can specify the types of financial and personal decisions allowed. The enduring power of attorney could cover financial decisions such as managing your bank accounts, paying bills, selling property and dealing with government departments such as Centrelink.



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.

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You should talk to the person you appoint about your wishes and if you have an advance health care directive you should share this with them (see below for more detail on advance health care directives).

A lawyer can help you make a medical enduring power of attorney or you can download a form from the office of the Public Advocate website, <http://www.publicadvocate.vic.gov.au/>.

Advance health care directive

An advance health care directive is a document that sets out your wishes for your future medical care. This is sometimes called a living will.

Types of issues it covers – 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 provide 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 impact on 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 while you have capacity.

If you make an advance health care directive and an appointment of enduring guardian, your guardian must comply with the advance health care directive.

In an emergency, where the medical practitioner or hospital is unaware of an advance health care directive and it is not possible to obtain consent for treatment, medical intervention may be carried out in what the medical practitioner or hospital believes to be in your best interests.

Refusal of Treatment certificate – Most lawyers will help you draft these documents or you can download the forms from the Office of the Public Advocate website. The refusal of treatment certificate must be signed by a doctor or another person to verify the refusal of treatment.

Where to keep a copy – You should keep a copy of your advance health care directive and give one to your GP, oncologist, or refusal of treatment certificate 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. State Trustees also operate a will bank service which is free in certain circumstances.

Whatever your wishes are, you should inform your family members and carers.



Superannuation death benefit nominations

When a member of a superannuation fund dies, the fund pays out their death benefit to one or more of their dependents. 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. Binding death benefit nominations must be updated every three years. Contact your superannuation fund for a nomination form.

You can only nominate someone who is a financial dependent (or interdependent), such as a spouse, de facto partner or child. If you have another life insurance policy (not connected to your superannuation account), you will need to nominate the beneficiary of that policy separately. Contact your insurer to do this.

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 gather 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
- Victoria Civil and Administrative Tribunal
www.vcat.vic.gov.au
- State Trustees
www.statetrustees.com.au
03 9667 6444
- Office of the Public Advocate
www.publicadvocate.vic.gov.au
1300 309 337

Note to reader

This fact sheet provides general information relevant to Victoria only and is not a substitute for legal advice. You should talk to a lawyer about your specific situation.

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