May 2021

Securing Their Future

Planning for the future when you care for a person with disability

VICTORIA State Government

state trustees

Office of the Public Advocate

Acknowledgments

Securing Their Future was first published as *Thinking Ahead* in 1990.

Many individuals and organisations since then have contributed to the development of the advice for those caring for a person who does not have capacity to make some decisions.

The following have provided invaluable advice:

- Moores Legal provided pro bono expertise
- Victoria Legal Aid (VLA)
- State Trustees
- Carers Victoria
- Tandem (formerly Victorian Mental Health Carers Network).

Disclaimer

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About the Cover Image

The cover image is a reproduction of an artwork painted by Rosa Bartone called 'Dare'. It won first place in the State Trustees 2015 art exhibition—'Connected'. This is an annual exhibition celebrating of artists participating with disability or mental health illness. Rosa says of her work that: "My dream one day is to walk again, freely, as if on air."

Elements from her work have been stylised and used throughout the booklet, designed by Nicholas Hopkins.

Dare
by Rosa Bartone

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About OPA and State Trustees

Office of the Public Advocate

The Office of the Public Advocate (OPA) is an independent statutory body that safeguards the rights and interests of people with disability in Victoria and works to eliminate abuse, neglect and exploitation of people with disability.

OPA provides advice and information on the rights of people with disability or mental illness, their treatment and care.

This may include:

- applications to the Guardianship List of VCAT
- administration and guardianship
- supported decision-making
- powers of attorney
- medical treatment decisions
- referral to OPA's Community Visitors Program.

The OPA Advice Service is available Monday to Friday, 9am–4.45pm, and can be contacted on: **Phone:** 1300 309 337 **NRS:** 133 677
Email: opa_advice@justice.vic.gov.au

State Trustees

State Trustees Limited (**State Trustees**) offers a broad range of legal and financial services to provide security and peace of mind in difficult times. Below is a snapshot of just some of the services State Trustees provides:

Financial Administration: State Trustees provides personal and tailored support to help people who, due to disability, illness or injury, are unable to manage their financial and legal affairs.

Powers of Attorney: A Power of Attorney lets someone else make important decisions on your behalf when you need it most. This can be a trusted relative, a friend or an organisation like State Trustees.

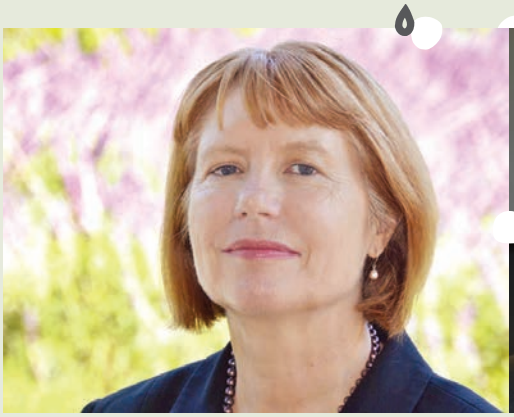
Trustee Services: State Trustees can act as the long-term trustee of trusts established by instruments such as Wills, Deeds and Court Orders. We can be the impartial, available professional for the long-term commitments and obligations required of a trustee.

Wills: A Will helps ensure those you love will be looked after when you're no longer here. State Trustees can help with the writing and storing of your Will.

Executor Services: State Trustees can be the impartial voice at an emotional time. When you appoint us as the executor of an estate, we'll manage everything so you can be sure the estate is handled professionally and with a minimum of fuss.

For more information, visit **statetrustees.com.au** or call 1300 138 672.

From the Public Advocate and State Trustees



Caring for a person who does not have capacity to make some decisions, or who may need support to make some decisions, can be both challenging and rewarding. You may naturally be concerned about what will happen once you are no longer able to care for them.

We understand the anguish carers feel about this.

This guide has been created to help you put in place some safeguards to ensure the person with disability you care for is properly provided for, if something were to happen to you.

The Victorian Civil and Administrative Tribunal (VCAT) can appoint a guardian, administrator, supportive guardian or supportive administrator and these may be ways of making sure the person is cared for. Information is included in this guide about these appointments.

It is also a good idea to make a Will and plan your estate so that your assets are passed on in a way that benefits the person who relies on you for financial support.

This guide is not a do-it-yourself kit; you should get legal advice. Make sure that your lawyer knows about planning for when you are deceased (known as 'estate planning'), as well as any specific issues relevant to the person with disability. Please note that this guide does not cover issues relating to the National Disability Insurance Scheme (NDIS), which is a too large a topic to cover here, unless it is of particular relevance to other topics in this guide.

If you have questions about any of the information included in this guide, you can contact the OPA Advice Service on 1300 309 337. Any feedback you have is also welcomed.

Colleen Pearce
Public Advocate

Matt Carrick
CEO, State Trustees

About this booklet

This booklet is written for parents, relatives or significant others in the lives of Victorian adults who do not have capacity to make some decisions, or who may need support to make some decisions.

A person may not be able to make, or may need support to make, some decisions for themselves. This can be as a result of:

- an intellectual or cognitive disability
- a mental or emotional illness
- an acquired brain injury
- an inability to communicate decisions.

If you need to help the person you care for make daily decisions, and something happens to you, you may be concerned about who will care for them. However, there are actions you can take now to ensure safeguards are in place, should they be required.

This booklet gives you information about:

- applying for an administrator to make decisions about a financial matter, or matters, for the person
- appointing an attorney under an enduring power of attorney so that decisions can be made for you if you cannot do this yourself
- making a Will or superannuation pension so your assets are passed on in the way you have chosen
- planning your personal estate and superannuation so that your assets are passed on in the most financially efficient way.

However, this guide is not a do-it-yourself kit.

You should get legal advice. Make sure that your lawyer knows about planning for when you are deceased (known as 'estate planning'), as well as any specific issues relevant to the person with disability.

Accountants, investment advisers and the organisations listed at the back of this booklet can also help you.

The law changes all the time. To make sure you have up-to-date information, you can contact the OPA Advice Service on 1300 309 337.

To help you, we have explained some words in 'What do these words mean' on page 38.

Administrators, guardians, supportive guardians and supportive administrators

It is a human right, enjoyed by all adults, to make our own decisions. Some people with disability need support to do this.

One way a person can be supported is by the appointment of a supportive guardian or supportive administrator. These are appointments the Victorian Civil and Administrative Tribunal (VCAT) can make under the *Guardianship and Administration Act 2019*. Keep in mind that, before someone close to the person considers applying to VCAT for such an appointment, consideration should be given to the option of a supportive attorney appointment. These are appointments that a person can make for themselves (see page 13).

Sometimes, even with support, a person is not able to make decisions about a financial or personal matter. VCAT may appoint a guardian and/or an administrator if there is no alternative to protect and promote the human rights of an adult with disability.

The guardian or administrator is appointed with legal authority to make decisions for the person about a specific personal or financial matter, or matters.

Guardians and administrators appointed under the Guardianship and Administration Act (on or after 1 March 2020) make decisions that reflect the person's will and preferences, unless it would cause serious harm to the person.

Applying for guardianship or administration

Guardianship and administration are about the protection and promotion of the human rights and dignity of people with a disability. Any adult can make an application to VCAT for a guardianship or administration order.

A person may choose to apply to VCAT if they are concerned that:

- a person with disability is not able to make a decision that needs to be made and
- an order is needed.

If the application is for someone under 18 years of age, the order will only take effect once the person turns 18 years of age.

The application form for an order is available on the VCAT website.

See 'Where to get help'.

The hearing

The person who is the subject of the application must be at the hearing so they have the chance to have their say. However, they do not have to attend if they do not want to or it is impracticable or unreasonable despite any arrangement VCAT can make.

VCAT should be informed of any adjustments that it can make to enable the person to attend. For example, interpreter or accessibility requirements, a preferred venue, or access to hearing loop technology.

VCAT will usually list a hearing within 30 business days from receiving the application, unless an urgent order may be needed due to an immediate risk of harm to the health, welfare or property of the person.

When will VCAT make an order?

VCAT may only make a guardianship or administration order if it is satisfied that:

- because of the person's disability, they do not have decision-making capacity in relation to the personal or financial matter*
- the order will promote the person's personal and social wellbeing
- the person is in need of a guardian or administrator having considered:
  - » the will and preferences of the person (if VCAT can find out what these are)
  - » whether the decisions for which the order is sought may be made informally or through negotiation or mediation
  - » the wishes of any primary carer, relative of the person, or someone with a direct interest in the application
  - » important relationships that the person has and the benefits in maintaining them.

* The applicant may need to provide a medical or specialist report about the person's decision-making capacity for the personal and/or financial matter or matters.

The Act says that VCAT should exercise its power in a way that is the least restrictive of the ability of a person with disability to decide and act as is possible in the circumstances.

Decision-making capacity

Adults are presumed to have decision-making capacity unless there is evidence to the contrary.

A person has decision-making capacity to make a decision if they are able to:

- understand the information relevant to the decision and its effect
- retain the information to the extent necessary to make the decision
- use or weigh the information, and
- communicate their decision in some way, including by speech, gestures or other means.

What is an administrator

An administrator is a person appointed by VCAT to make decisions about a financial matter, or financial matters, for an adult with disability who does not have decision-making capacity in relation to them.

A **financial matter** is any matter relating to the person's financial or property affairs, including any legal matter that relates to their financial or property affairs.

Some examples are:

- paying expenses for, or debts of, the person
- making investments for the person
- undertaking a real estate transaction for the person.

An administrator can sign legal documents to give effect to a power that they have under the VCAT order.

Administrators must keep accurate records of all dealings and transactions, and lodge annual accounts to VCAT for examination or auditing.

An administrator's financial interests must not conflict with those of the person, unless authorised by VCAT or law.

The person you care for does not usually need an administrator if they have a valid enduring power of attorney (financial) made before 1 September 2015, or an enduring power of attorney made on or after 1 September 2015, in which they have appointed an attorney for financial matters. The person you care for would need to have had decision-making capacity to make the enduring power at the time they made it. Otherwise, the power of attorney is not valid.

Please note that an administrator appointed under the Guardianship and Administration Act is different from an administrator appointed by the Supreme Court to deal with an estate where the person has died without a Will.

What is a guardian?

A guardian is a person appointed by VCAT to make decisions about a personal matter, or personal matters, for an adult with disability who does not have decision-making in relation to these matters.

A personal matter is any matter relating to the person's personal or lifestyle affairs, and includes any legal matter that relates to their personal or lifestyle affairs.

Some examples are:

- where and with whom the person lives
- what services the person gets and activities they are involved in
- restricting visits to the person
- medical treatment decisions.

Please note that it may not be necessary to apply for a guardian to be appointed if the only decisions that need to be made are about:

- medical treatment (see page 11 for more)
- NDIS services where there already is, or could be, a plan nominee appointed to support the participant through the NDIS process.

The person you care for does also not usually need a guardian if they have a valid enduring power of attorney in which they have appointed an attorney for personal matters. The person you care for would need to have had decision-making capacity to make the enduring power at the time they made it, otherwise it is not valid.

Role and responsibilities of guardians and administrators

The order will specify the matter(s) that the administrator or guardian can make decisions about.

VCAT must reassess the order within 12 months, unless stated otherwise in the order. At the time, VCAT will consider whether the guardian or administrator has performed their duties.

Supporting the person

Depending on the specific decision that needs to be made, the represented person may be able to make the decision. Guardians and administrators should support the represented person, as far as practicable and appropriate in the circumstances, to do so.

Making decisions

If the represented person cannot be supported to make their own decision about the matter, the guardian or administrator will make the decision. They should support the person to express their will* and preferences and to participate as much as possible in the decision.

* For example, a person may express, through their words and actions, their will to live independently and be well.

Guardians and administrators should:

- give all practicable and appropriate effect to the represented person's will and preferences if these are known and, if not, to what they believe these are likely to be*
- only override the represented person's will and preferences if it is necessary to do so to prevent serious harm to them
- consider the importance of any companion animal to the person.

* In some circumstances, the guardian or administrator may not be able to identify the represented person's likely will and preferences. If this is the case, they make a decision that promotes the represented person's personal and social wellbeing.

Duties

Guardians and administrators are required to:

- act as an advocate
- act honestly, in good faith, and with reasonable skill and care
- encourage and assist the represented person to develop their decision-making capacity
- act in a way to protect them from neglect, abuse or exploitation
- not use the position for profit or act if they have a conflict of interest (however, administrators may be permitted by law or VCAT to charge fees)
- not disclose confidential information gained in their role unless authorised to do so under the order or by law.

Administrators have a range of other duties including in relation to:

- management of the property of the represented person
- keeping records and accounts
- providing annual accounts to VCAT.

Guardians and administrators who fail to comply with their duties may be ordered to compensate the represented person for any loss. If they act dishonestly, they may be guilty of a criminal offence.

Medical treatment decisions

If a guardian makes a medical treatment decision, they must follow the process set out in the *Medical Treatment Planning and Decisions Act 2016* and make the decision they reasonably believe the represented person would have made if they had capacity to make the decision.

Is a guardianship order needed so that someone has authority to make medical treatment decisions for the person?

No.

A person's **medical treatment decision maker** can make most medical treatment decisions for a person who does not have capacity to make these.

A person's medical treatment decision maker is the first person from the list below who is reasonably available and willing and able to make the decision.

1. A medical treatment decision maker appointed by the person
2. A guardian appointed by VCAT to make decisions about medical treatment
3. The first of the following people who is in a close and continuing relationship with the person:
   a. the person's spouse or domestic partner
   b. the person's primary carer (not a paid service provider)
   c. an adult child of the person
   d. a parent of the person
   e. an adult sibling of the person.

If more than one relative is first on this list, it is the eldest.

If there is no medical treatment decision maker for a person who does not have decision-making capacity to make the medical treatment decision, Victoria's Public Advocate has authority to make significant medical treatment decisions for the person. The Public Advocate has this authority under the Medical Treatment Planning and Decisions Act.

If you are unsure about who is the medical treatment decision maker, or whether a guardianship order is required, contact the OPA Advice Service.

See 'Where to get help'.

Are there any medical decisions a medical treatment decision maker cannot make?

Yes.

A medical treatment decision maker (including a guardian with power to make medical treatment decisions) does not have the authority to consent to the following medical procedures:

- treatment that causes permanent infertility
- termination of pregnancy
- removal of tissue for transplants.

Supportive guardianship and supportive administration

Supportive guardianship and supportive administration orders are new orders that VCAT can make under the Guardianship and Administration Act.

The role of a supportive guardian or supportive administrator is to support a person with disability to make their own decisions.

They support the person to make, communicate and/or give effect to decisions about:

- the personal matter(s) set out in the order (supportive guardian)
- the financial matter(s) set out in the order (supportive administrator).

The order may give them authority to get information from others about the person to help the person make a decision. For example, from doctors, banks, utility providers, disability organisations or government agencies.

Who can apply?

Any person may apply to VCAT for a supportive guardianship or supportive administration order for an adult with disability. However, the application will need to propose someone for the role and they will need to agree to take it on.

Unlike guardianship and administration applications, VCAT will not appoint the Public Advocate, State Trustees or similar body if there is no one suitable who agrees to take on the role.

For a supportive guardian or supportive administrator to be appointed, the proposed supported person will need to agree.

What if there is an application for a guardian or administrator?

VCAT may decide a supportive guardianship or supportive administration order is a more appropriate option after considering an application for a guardianship or administration order.

Other ways a person can be supported to make decisions

Apart from supportive guardianship and supportive administration orders, there are other ways that a person can be supported to make their own decisions. For example, see ‘Supportive attorney appointments’ on page 13.

Making powers of attorney

Powers of attorney are legal documents that allow you to appoint someone else who can make decisions for you, or support you to make and act on your own decisions.

If you make a **supportive attorney** appointment, you appoint someone to support you to make and act on your decisions.

If you make an **enduring power of attorney** appointment, you appoint a substitute decision-maker with authority to make decisions for you when you do not have capacity to make decisions.

You can make a power of attorney appointment if you are 18 years of age or older and have decision-making capacity to make the appointment. This includes understanding the effect of your decision to make such an appointment. No one else can make a power of attorney on your behalf.

Supportive attorney appointments

Making decisions is an important part of exercising rights. Supportive attorney appointments are a way you can be supported to make and act on decisions. You retain decision-making authority.

Supportive attorney appointments are designed to promote the rights of people with disability. The person you care for may want to consider making a supportive attorney appointment if they are 18 years of age or older and have the decision-making capacity to make the appointment. While they can be supported informally, making a supportive attorney appointment can be helpful as organisations must recognise the authority of the person in the support role.

The person you care for may also want to consider appointing a **support person** who can support them to make medical treatment decisions. A medical support person appointment can be helpful if the person you care for is able to make their own medical treatment decisions but wants the support of another person in matters such as accessing health information and communicating their decisions about medical treatment.

For more information for carers about these appointments see OPA's publication

Supported Decision-Making in Victoria: A guide for families and carers which can be downloaded from the OPA website.

You do not need to have a disability to make a supportive attorney appointment or appoint a medical support person. There may be reasons you would consider doing this for yourself. These appointments, however, do not help if you are planning for the future. For example, your supportive attorney appointment would not have effect if you later became unable to make your own decisions. This means if you wish to have someone make decisions for you, if you become unable to make your own decisions, you should consider making an enduring power of attorney.

Enduring power of attorney

Making an enduring power of attorney is a way you can plan for the future. The power endures (continues) if you become unable to make decisions about particular matters.

By making an enduring power of attorney, you can choose who will make decisions for you, if you are unable to do so in the future.

This can help you plan for:

- your personal and lifestyle matters
- the management of your financial affairs into the future.

If you make an enduring power of attorney, you choose another person (or people), known as your attorney(s), to make decisions for you.

These decisions could be about:

- financial matters, including any legal matter that relates to your financial or property affairs, and/or
- personal matters, such as where you live, and support services you might need, but not including decisions about your medical treatment.

If you take care of a person with disability and you make an enduring power of attorney, you can authorise your attorney(s) for financial matters to use your property (including your money) to provide for your dependant(s), including that person. Importantly, you need to authorise this in the enduring power of attorney.

Medical treatment decisions

If you appoint someone as your attorney under an enduring power of attorney, this person cannot make medical treatment decisions for you unless they are also your **medical treatment decision maker**.

To identify who your medical treatment decision maker is, see page 11.

You can choose who your medical treatment decision maker is by appointing someone to this role. You appoint them under the Medical Treatment Planning and Decisions Act.

The Act commenced on 12 March 2018. Valid appointments made before this are recognised. For example, this means if you made a medical enduring power of attorney before this, the person you appointed is recognised as your medical treatment decision maker without the need for you to make a new appointment.

Your medical treatment decision maker only makes decisions for you if you do not have decision-making capacity to make the medical treatment decision. They must make the decision that they reasonably believe you would make if you could. If you talk to them about what is important to you, this will help them in their role. You may also choose to complete an **advance care directive** which is a form where you can write down what is important to you. You can also make some decisions for the future. For example, if you have a serious illness you may already know what medical treatment you want or do not want in the future.

How do I make a power of attorney or appoint a medical treatment decision maker?

You can make these appointments yourself, or may choose to have the help of a lawyer or other service such as State Trustees. There are witnessing requirements that must be met to make valid appointments. If your legal affairs are complex, you should seek legal advice.

A good place to start is the free OPA publication *Take Control of your future decision-making.*

Making a Will

Making a valid Will is very important, especially if you care for a person with disability. It is the only way to ensure your personal estate is passed on in the way you would have wanted.

If you die without a Will, your estate (or at least those assets in Victoria) are distributed in accordance with a statutory formula set out in the *Administration and Probate Act 1958*. Different rules may apply for certain assets held elsewhere. Usually your assets are passed on to your surviving spouse or partner and your children first, or otherwise to next-of-kin such as grandchildren, parents or siblings. These rules, however, do not consider how you want the person with disability to be looked after, so they may be left out or not receive sufficient provision.

What is a Will?

A Will is a legal document that states what you want to happen to your estate after you die. A person you name in your Will to receive all or a part of your assets or other benefits, such as income, is called a 'beneficiary'.

In your Will you can:

- nominate who gets your assets, such as houses, cars, bank accounts, shares, chattels and personal items like photographs, art works, furniture, collections, sentimental items and heirlooms
- appoint the person (executor) who manages your estate
- establish a trust for the benefit of beneficiaries.

Some assets, such as superannuation and life insurance may not be part of your estate. The entitlements may be paid directly to persons who you have nominated or family members (usually dependents) rather than to the estate.

You should read the relevant policy documents or contact the relevant fund as to the ability to nominate particular persons or the estate to receive any superannuation or life insurance benefits and whether such a nomination is binding. As nominations may need to be reviewed and renewed, you should seek legal or financial advice if you are uncertain.

Who can make a Will?

To make a Will, you must be 18 years of age and have testamentary capacity.

The only exceptions are:

- a minor who has testamentary capacity may make a Will if they are married or make the Will in contemplation of marriage
- the Supreme Court may make a Will on your behalf if you don't have testamentary capacity.

Testamentary capacity means that you must understand:

- the nature of a Will and its effect. In other words, that it operates on your death to distribute your assets
- the nature and extent of your assets. You do not have to know their exact values and balances, just to have enough awareness of your assets and resources to decide who is to receive them on your death
- the persons for whom you ought to have regard. This means not only the people you are including in your Will but persons such as close family members who may not be included. You do not have to provide for all close family members, but you must have considered them.

If a person does not have testamentary capacity, it is still possible for a Will to be made. To do this, you or someone on their behalf will need to apply to the Supreme Court and persuade a Judge that a Will is required and the terms of it. The court will look at several issues.

Issues might include:

- the likely size of the estate
- a draft of the proposed Will
- reasons why a Will is being sought
- evidence about the person's wishes
- any unintended effects if a Will is not made.

A court-made Will is a complex process and is not common. You will need to seek legal advice.

See 'Where to get help'.

How do I make a Will?

To be valid, your Will must be:

- in writing
- signed and dated by you in the presence of two adult witnesses. It is good practice to ensure the witnesses are not persons who may benefit from the Will
- signed and dated by the two witnesses at the same time and in your presence. It is good practice that all persons signing the Will use the same pen
- made with the intention of being a Will. It is not necessary to use the word "Will".

If the points above are not followed, your Will is not valid. A document not made in accordance with the rules is called an 'informal Will' The Supreme Court may still

confirm an informal Will but it is not certain, and it will take time, require evidence and is likely to be an expensive exercise.

You need to be especially careful if making a Will without the assistance of a solicitor or Trustee Company. If using a Will kit, it is important to read, understand and follow the instructions.

If there is a question about your testamentary capacity to make a Will, it is important to ask a G.P. or psychologist to provide a written assessment of your capacity. It may even be appropriate to seek an affidavit (rather than just a letter) about your capacity as it may be hard for the executor to locate the G.P. after your death if further evidence of your capacity is needed. It is good practice to keep the capacity certificate or affidavit with the Will. Make sure you choose a G.P. who has known you for some time or a specialist. They should be familiar with the legal test for assessing testamentary capacity.

You could also get:

- the Will writer or witnesses to make a written note of their reasons for believing you have the capacity, but noting their evidence may not be considered as strong as a medical practitioner
- one of the witnesses to be your treating doctor.

Once the Will is signed and witnessed, it should not be written on or typed over.

Also, take care to ensure that nothing is pinned, stapled or attached to the Will. If this occurred it would need an explanation to the court which is additional effort and cost to prove the Will.

Keep the Will in a safe place, for example, with a lawyer, trustee company, in a bank or in a safe. You may wish to tell your executor where the Will is kept. If you wish you can give them a copy in a sealed envelope, but equally you may not wish to do so. Someone, however, needs to know where to locate the document after you die.

Your Will can be stored with State Trustees or the Supreme Court.

It can be written in a language other than English. The contents would need to be translated when proving the Will in Victoria.

Similarly, a person making a Will may not be able to speak, read or write in English. If so, the Will needs to be read and/or translated for the person. The Will writer or interpreter would need to make an affidavit which would be submitted to the court with the Will when seeking to prove the Will. In such cases it is appropriate to seek legal advice as to the requirements.

Do I need an executor?

It's important to appoint an executor in your Will. This needs careful consideration.

An executor is someone who deals with your personal estate after you die. They carry out the instructions in your Will, including passing on your assets to beneficiaries.

The tasks of the executor are many and varied and include:

- locating the original Will
- arranging the funeral
- obtaining a grant (the order of the court allowing the administration of the estate)

- identifying and locating beneficiaries
- collecting or redeeming all the assets and, if necessary, having them valued
- securing and insuring the assets including changing locks on properties
- finding out what debts are owed and paying them from the money made by selling or redeeming assets
- dealing with beneficiary and Will issues such as beneficiary or creditor disputes and family provision claims including litigation
- claiming superannuation and life insurance policies payable to the estate
- arranging, signing and submitting both 'date of death' and 'estate' tax returns
- passing on the assets to beneficiaries
- accounting for the administration of the estate.

If the estate assets or family dynamics are complex or there is likely to be conflict, then you may want an independent executor. Think about who is best suited to administer your estate.

Consider things like age, availability, commercial knowledge, the ability to deal with disputes, whether trust will continue for many years and whether the relevant person would want to act as executor. Get advice about who might be the most suitable person. Often the best person may not be a partner or close family member. It can be a lawyer, accountant or professional trustee company.

It is important to consider an alternative executor. If your first named executor dies, loses capacity, moves from Victoria or does not wish to act, then your alternate executor can undertake the role.

You can also choose multiple or joint executors but make sure they can work together. There may be good reason for such an appointment, but it needs to be practical. It would be appropriate to obtain legal advice as to options and likely issues to consider. This may include decisions about whether the executors are to act jointly or jointly and severally.

Can I change my Will?

You can change your Will as often as you like, if you have testamentary capacity and any new Will is properly signed and witnessed on each occasion.

As a rule, you should review your Will at least every five years. Many things can change over that time. It does not mean you need to alter your Will, but simply that you have considered the document to determine it is still in accordance with your wishes and current circumstances.

You may want to change your Will if:

- you change your mind who you wish to receive your estate
- you marry or commence a domestic relationship
- separate from your partner
- divorce
- a proposed beneficiary, executor or trustee has died
- you want to include new beneficiaries.

You should consider making a new Will if you:

- buy a significant asset or investment
- get involved in a new business, company, trust or superannuation fund
- take on new responsibilities
- have new assets, for example, receive an inheritance or funds on retirement.

Marriage revokes (cancels) any pre-existing Will, unless the Will was made because you thought you would get married. This should be stated in the Will. Gifts in the revoked Will to the person you marry are preserved.

Divorce does not cancel the Will, but it usually cancels any entitlement that your ex-partner has in your Will. If your ex-partner was named as an executor, trustee or guardian for children, then the divorce also cancels these appointments. Separation from a partner does not affect the Will. For this reason, you should consider making a new Will on separation, as a divorce may not take place for some time or at all.

It is best to make a new Will, especially if the changes to your Will are substantial. If the changes are small, you could consider the use of a 'codicil'. A codicil is a document to be read in addition to a Will and that adds to, amends or qualifies some aspect of the Will. Both documents are to be proved after you die and both documents need to be made when you have testamentary capacity and be properly signed and witnessed. If you choose a codicil, it is a good idea to get a lawyer to handle it as there are certain formalities which are desirable such as referring to the original Will.

Can my Will be challenged?

Your Will can be challenged after you die if:

- it is asserted that you did not have testamentary capacity at the time it was signed
- it is asserted you did not make the Will freely or your decisions were pressured by others
- a person you had a responsibility to provide for, believes that you have not left them a fair share of your assets. This type of claim may be called a family provision claim, Part IV claim or testator family maintenance (TFM) claim. These terms all describe the same type of claim under the Administration and Probate Act. The claimant must be an eligible claimant and is commonly a spouse or partner, child, grandchild or stepchild, but note there some other categories. If any such claim is likely to be made, then it would be appropriate to obtain legal advice when making your Will.

In dealing with family provision claims, the court is required to consider a whole range of factors. This would include the size of the estate, the needs of the claimant and other beneficiaries, and the nature of the relationship during its lifetime.

Courts will especially look at the needs of a person with a disability and whether, in all the circumstances, adequate provision has been made; whether an additional sum will improve the claimant's lifestyle without being unfair to other relevant persons such as close family members. When making such a determination, things like Centrelink entitlements, disability support pensions are **not** considered, but an NDIS plan may be considered.

An application to challenge a Will must usually be made within six months of the grant of probate, but there are some exceptions to this.

To make it less likely for your Will to be challenged, make sure:

- your Will is properly prepared, witnessed and signed
- you give your partner and all your children a fair share of your assets, especially if they depend on you for support
- your reasons for the Will are properly recorded
- you have a solicitor or trustee company assisting with the writing of the Will, if there is any uncertainty.

Do I need a lawyer?

If you care for a person with disability, it is best to use a lawyer or a professional trustee company to make your Will.

You should also think about getting a lawyer if:

- you want to leave your assets to a lot of people
- you have young children
- you own assets with another person, such as a house, or joint bank accounts
- you are a sole trader, in a business partnership or have an interest in a private company
- you have assets that are interstate or overseas
- you get income from a trust or a family company, or you are involved in a trust or a family company
- you want to provide for a child with a disability
- you are concerned the Will may be challenged in the future
- there may be doubts about your capacity
- you are uncertain about ownership of assets, superannuation or life insurance
- you are uncertain about how to go about the process
- you have difficulty reading, writing or understanding the English language.

Most solicitors prepare Wills, but not all. Some solicitors may also offer other services, such as estate planning and administration of estates. Costs for drawing up a Will vary depending on what you need, for example, a complex Will that establishes a trust will be more expensive. It is a good idea to obtain quotes first.

The Law Institute of Victoria has a free legal referral service. It can provide the contact details for legal firms that practice in the area of law you need.

See 'Where to get help'.

Planning your estate

Planning your estate lets you make sure you have provided for the person with disability you care for. It can reduce the risk of arguments about who gets what when you die.

What is estate planning?

Estate planning is a way of making sure your assets and belongings are passed onto your beneficiaries in the best way possible.

An estate plan should:

- make good financial sense
- be simple to manage
- be inexpensive to maintain
- get reviewed regularly.

Estate planning laws are complex. Get legal and financial advice to make sure you get the most benefit for the person with disability and any other beneficiaries.

Most people working in this area will undertake tax and means-tested pension planning as a part of your estate plan. They will also look at how you can get the most use and enjoyment of your assets while you are alive, while still providing for your beneficiaries after you die.

What do I need to consider when planning my estate?

Here is a list of things to think about before you start planning your estate:

- What are my assets?
- Do I have other resources like superannuation and life insurance?
- Do I have debt?
- Who do I want to leave my estate to?
- Who do I want to administer my estate?

- Who could contest my Will?
- How much will it cost me to set up the proposed arrangements? Are there any ongoing costs?
- What is the best option that will take care of the needs of the person with disability?
- Is there enough flexibility in case the person's situation changes?
- If the person cannot look after their financial affairs, who can help them and what kind of powers do I want that person assisting to have. How will I make sure they do their job?
- Who will ultimately inherit my assets after the death of the person who is receiving the benefit of my trust?
- Who will be the Trustee of the trust? (That person may not be the same person as my executor. The trustee may require certain skills or be ongoing for many years.)

If you have other family members or beneficiaries to consider, you may also need to think about:

- their age and needs
- whether they have any independent income or assets
- the relationship between the person with disability and any of your other family members or beneficiaries without disabilities
- whether there is likely to be a family provision claim against the estate.

If all your beneficiaries are minors, then each are likely to need support. However, if your other beneficiaries are adults and financially independent, you may want to leave more of your estate to the person with disability. It is not necessary to provide for all family members equally. It may be appropriate to talk to all your beneficiaries about what you want to do, but that will depend on your individual circumstances as that may not be your preference. You may wish to structure your estate to ensure the person under a disability is protected and cannot be taken advantage of.

Thinking about these issues will help you decide how you want to leave your estate to the person with disability.

Some options are to leave your estate:

- directly to the person (depending on their level of disability)
- to the person on trust and to nominate a trustee to manage their financial affairs
- to a friend, relative or service provider in return for appropriate care of the person (but this is to be read with some caution).

Leaving your assets to the person with disability

You can leave your assets directly to the person with disability in your Will.

You can also establish a trust and nominate a trustee if you are worried about the person's ability to look after their financial affairs. (See page 28, 'Leaving your assets in a trust or superannuation pension'.)

Leaving assets directly to the person with disability

You can leave assets directly to the person if they are 18 years of age or over. In doing so, they receive their share absolutely and can deal with the assets or funds as they please. This gives the person a chance to act as an independent member of the community. Depending on the amount of funds and level of disability, this may, however, be a significant risk.

If the person cannot look after their inheritance, a family member or other concerned person can apply to VCAT to appoint an administrator to make financial decisions on their behalf.

There may be a time delay before this occurs and the funds or assets may be at risk of being spent, wasted or lost in the meantime.

You can nominate your preferred administrator in your Will, it will, however, be for VCAT to determine if the appointment is required and who should be appointed as the financial administrator.

(Note the term 'financial administrator' appointed by VCAT differs from an 'administrator' appointed by the Probate Office. The VCAT financial administrator looks after the financial affairs of a person with a disability in their lifetime. The administrator appointed by the Probate Office manages the estate of a person who dies without leaving a will. Use of the term 'administrator' in each instance can be confusing.

You will need to direct your executor to apply to VCAT for the appointment of the financial administrator.

Good reasons for using an administrator

It will be a person or organization (like a trustee company) who you believe will have the time, willingness and skills to look after the interests of the person with a disability.

VCAT has safeguards to protect the person's best interests:

- It will ensure the suitability of the appointment in the first place.
- An administrator must lodge an annual account of the person's finances, unless there are rules that mean they do not have to. The accounts will be looked at by an examiner appointed by VCAT to check the administrator is acting in the best interests of the person.
- An administrator can ask VCAT for free advice at any time.
- Any person concerned about the ongoing management of the affairs of the person with a disability may apply to VCAT to reassess the appointment.

Other reasons for not leaving your assets directly to the person with disability include:

You may not be able to control what happens to your assets on the death of the person with disability. If the person does not have a Will, their assets may be automatically passed on according to intestacy rules. These rules say how assets are passed on to surviving relatives. If the person has a Will, it may not be in accordance with your preferences or they may be influenced to lend, give away or leave their money to someone. If this is not what you want, speak to a lawyer and consider a trust.

See 'Leaving your assets in a trust or superannuation pension'.

The reasons you may not want to use an administrator include:

VCAT chooses who will be the administrator. Although you can nominate an administrator in your Will, there is no guarantee that VCAT will appoint them. VCAT will listen to other interested parties before it makes a final decision.

Even if an administrator is appointed, leaving your assets to a person with disability may affect the person's Centrelink pensions and benefits because the assets will be owned by the person, not by the administrator. Talk to a lawyer, trustee company or financial planner if this is a concern.

What happens to Centrelink payments and other benefits?

If you leave assets directly to the person with disability, it may affect their social security pension or benefit, including health, pharmaceutical and gas/electricity benefits. A lump-sum inheritance, or income from investments, can reduce or stop their pension. This is not the case, however, if the assets are left in a special disability trust. (More information about eligibility for special disability trusts starts on page 28.)

Being cut off from a Centrelink benefit may make life very hard for the person with disability. Entitlements to a pension or benefit can mean more than regular income. They might also give the person the chance to be involved in an employment program, day program, recreational activities or live-in supported accommodation. You can get information about pension entitlements from Centrelink.

If your wealth is likely to impact on the person's means-tested pension eligibility when you die, it is worth thinking about using a special disability trust, superannuation death benefits pension or other protective option. It is a good idea to seek professional advice.

See 'Where to get help'.

What happens to the assets when the person with disability dies?

If the person with a disability has testamentary capacity, they can make a Will to pass on their assets. Even if the person is not capable of looking after their own finances, they may still be able to decide who they want to leave their assets to. There would need to be evidence of their testamentary capacity form a medical practitioner.

If they lack capacity to make a Will, the Supreme Court can authorise a Will to be made for them. This is unusual and is an involved process.

If the person dies without a Will, assets will be passed on according to intestacy rules. This might mean that assets may be passed on differently from what you may want. For example, if the person with disability is your child or adult child, their other biological parent can inherit assets, even if you are separated and they have not had much contact with the person.

The situation is quite different where the person with the disability receives income or assets via a trust. In that case, you may still decide who will ultimately receive the balance of the trust when the person with a disability dies.

Leaving assets to relatives or friends

You may be thinking about leaving your wealth to your children without disability, a relative or a friend and asking them to look after the person with disability.

This is not the best way to proceed because:

- you have no control over the decisions the relative or friend makes and how the funds are ultimately used
- a request, even if it is written in the Will, is not legally binding on the relative or friend
- it may mean that the needs of the person with disability will not be thought about or may get completely overlooked
- the circumstances of the relative or friend may change. This could include such things as death, loss of capacity, divorce or bankruptcy.

Also, if it is considered there has been insufficient provision for the person with disability, the estate and terms of the Will can be challenged in the Supreme Court.

Challenges can also occur with superannuation policies through the Superannuation Complaints Tribunal.

The court or tribunal can alter the terms of the will or distribution of assets either in favour of the person with disability or other claimants.

If you want to make a relative or friend responsible for looking after your assets, the safest options are to:

- nominate a person in your Will who you want to be appointed as administrator by VCAT
- create a protective trust and appoint the relative or friend as one of the trustees.

Leaving your assets in a trust or superannuation pension

Another way to look after the person with disability is to create a special disability trust or other protective trust in your Will or ensure that the person receives a death benefits pension from your superannuation fund.

This allows you to:

- plan how your assets will be used and looked after
- protect your assets from the creditors (if any) of the person
- (in the case of superannuation) qualify for the lower tax treatment for superannuation pensions
- (in the case of a protective trust) have greater control over what happens to your assets
- (in the case of a protective trust) choose the trustees or professional trustee company that you want to look after the trust.

Establishing a protective trust costs more than making a standard Will, as a trust is more complex. It is strongly advised to get help from a lawyer or a professional trustee company if you are going to include a protective trust in your Will.

Establishing a death benefits pension requires the cooperation of the trustee of your superannuation fund. To be eligible for a death benefits pension that can continue through the person's adult years, the person will also need to have disability that has a significant impact on their mobility, communication or decision-making.

What is a protective trust?

A protective trust is where trustees are chosen to manage assets for the benefit of another person (the beneficiary). The trustee can be individuals or even a professional trustee company, such as State Trustees. A trust can be set up before you die or can be set up in your Will.

Where a protective trust is established in your Will, the trustees' responsibilities are set out in the Will. You can set out specific directions to the trustees. For example,

you could ask the trustees to give the person a certain amount of money each year and set aside some money to pay for unexpected things.

You can also instruct trustees as to what to do with the unspent income from the trust.

They could:

- add the extra income to the trust each year
- give the extra income to your other beneficiaries
- give the extra income to a nominated charity.

You can also limit the trustees' powers by setting specific options they can choose from. It is usually better to be flexible.

What are the different types of trusts?

Protective trusts, such as a special disability trust, are the most relevant trusts for a person with disability who you care for. The terms of protective trusts don't allow the trustees to disregard the needs of the person in favour of other beneficiaries.

A protective trust has either a single lifetime beneficiary or, may also include the lifetime beneficiary's children as beneficiaries as well. A protective trust allows the trustees to earn income or to spend income and some or all of the capital in the trust, but it must be for the benefit of the person with disability. The trustees do not have to give the money directly to the person and can instead directly pay expenses on their behalf.

What is a special disability trust?

A special disability trust is a type of protective trust for a person who has severe disability (check with Centrelink if the person is eligible).

Anyone can donate to the trust. Immediate family members of the beneficiary with disability who donated funds or assets to the special disability trust and who are also eligible for Centrelink benefits, will reduce their personal assets by the amount donated, but not be treated as having exceeded, the normal 'gifting' rules (these are subject to Centrelink regulations).

This means the person who has donated funds or assets to the special disability trust may be able to receive a higher pension themselves as well as enabling their family member with disability to benefit from the donated funds or assets.

Immediate living family members can donate up to a total of $500,000. Any more than this will not reduce their income and assets for the purposes of getting a pension. A property for the principal residence of the person with a disability can also be contributed.

A special disability trust has conditions:

- the trust and income earned from it must primarily be used to pay for the care and housing of a person 16 years of age or older with severe disability. (At time of publication, this amount was $12,500 a year, CPI indexed, which can be spent on their other needs)
- the trustees must lodge financial reports with Centrelink each year
- the trustees may have to do an audit if Centrelink asks for one (the trustees must use independent, qualified auditors)

- trustees, other than professional trustee companies and lawyers, are not allowed to charge fees for being a trustee.

The person with disability may not have capacity to make some decisions, or may need support to make some decisions, but they may not be considered to have severe disability. Centrelink's definition of severe disability includes that a person over 16 years of age will most likely be unable to work in regular paid employment for more than seven hours each week.

A special disability trust can be set up on behalf of anyone who is an eligible beneficiary. It can be a part of the Will, as either an option for the executor or as a direction to the executor. The Federal Government Department of Social Security provides a Model Trust Deed for Special Disability Trusts which can be modified to suit your purposes. (See **dss.gov.au** or Google 'model trust deed disability'). This makes it possible for someone caring for a person with disability to properly create a special disability trust without the need of a lawyer. However, it may be helpful to seek the services of a lawyer experienced in such matters to make sure the deed is free of errors and no requirements have been overlooked.

You can only get Centrelink's exemptions/special benefits if the special disability trust fits in with its strict requirements.

It is important to check with Centrelink about its eligibility requirements for special disability trusts. Contact Centrelink's Financial Information Service.

See 'Where to get help'.

What do the trustees do?

The trustees' duties and obligations must be clearly set out in the terms of the trust. An important part of a trustees' obligations is investment. They must invest using care and skill to make sure the assets are earning an income, for example, they should not leave a property vacant for too long without looking for someone to rent it. If they did do something like this, it could be seen as a breach of the trustees' obligation. The trustees may have to pay for any of the trust's losses.

Trustees must keep proper accounts. In the document creating the trust, you can ask for the accounts to be regularly checked. The beneficiary (or person authorised by them) can ask to see all information about the trust and investments. The trustees must provide this information.

It is important to give your trustees the power to use both the assets and the income for the person's needs. Remember, in a protective trust, the trust is set up for the sole, lifetime benefit of the person with disability.

How do I choose trustees?

Think carefully before you choose trustees. You are giving them a lot of responsibility. As well as being able to look after finances, trustees must understand the needs and wishes of the person with disability.

You can choose:

- an individual, such as a relative or friend
- a professional trustee company
- a service provider.

Before you choose, get legal advice.

Appointing individuals

You can appoint between two and four individuals to be the trustees of a special disability trust and between one and four individuals for other protective trusts. You can also appoint particular trustees to help get a balanced outcome, for example, you could choose someone who knows the person, such as a relative or friend but does not have investment skills. You could choose a second trustee who is a financial expert, such as a lawyer or an accountant. If co-trustees are appointed, the signatures of both trustees are needed to authorise the investment and spending of any trust money. It is also important that the trustees be compatible.

There are two main advantages in appointing individuals, rather than a professional trustee company.

These are:

- people you know are more likely to know how you would want the estate to be looked after; even if the individual wants money for their services, their fee is usually lower than that charged by professional trustee companies. (Note that only lawyers and professional trustee companies can charge to be a trustee of a special disability trust, unless the trust document or a court order allows the trustee to be paid.)
- if you want to appoint an individual as trustee, think about their age. There is no use appointing only trustees who are 20 or 30 years older than the person with disability. You should appoint at least one person who is likely to outlive them. Get advice about how to appoint alternative trustees who can take over if the initial trustees cannot continue their duties.

The disadvantages are:

- potential for conflict between individuals or dominance of one individual trustee over another
- lack of availability of individual trustees
- lack of skills and commitment or diligence to trustee duties.

If the person with disability is your child or adult child, you may want to appoint one or more of your children without disability to act as a trustee. However, if you also want them to be residuary beneficiaries in your Will, this may be a conflict of interest which may or may not be a concern to you.

If this is a concern, you should think about:

- appointing a person who is not a residuary beneficiary to act as co-trustee, if you think they can work well together to benefit the person with disability
- only appointing trustees who are not residuary beneficiaries under your Will.

Appointing a professional trustee company

There are Victorian laws to regulate the activities of professional trustee companies.

There are benefits associated with using a professional trustee company.

Some of these are:

- it is completely independent, so you do not have to worry about any conflict of interest
- it will administer the estate or trust for as long as needed, which means you do not have to worry about appointing an alternative trustee.

Companies offering these services are also required to have a level of professionalism associated with providing their services, high standards of record keeping, compliance requirements, are subject to audit and also have insurance coverage. However, you do not get the same personal touch you would get from a relative or friend. If this is a concern, you can ask a trusted relative or friend to be a co-trustee.

This may give a balanced personal touch with professional services. Professional trustee companies will charge for their services. Professional trustees have different rates and types of charges. You should review the fees and charges of any professional trustee in detail — which may include fees for consulting with a relative or friend acting as a co-trustee — and ask any questions before deciding to engage an organisation.

See 'Where to get help'.

Appointing a service provider

Service providers, such as day training centres or residential-service committees, may be able to act as a trustee, although such arrangements are uncommon. Check with the service provider first.

Supported Residential Services may not be able to act as a trustee, as they cannot look after a resident's money above a certain amount. Other organisations may not want the responsibility of a trust because they cannot promise lifelong care, or do not have the time or staff available.

Consider whether the organisation is likely to be around for long. If an organisation is new or its funding is not certain, it is risky to appoint it as a trustee.

Also, investigate whether the organisation is likely to get any benefits under the trust, such as use of the family home or income. If so, appoint a second trustee that is not associated with the organisation to make sure that there is no conflict of interest.

In general, a company or organisation providing services for a fee to the person you care for with disability, may have an intrinsic conflict acting as the trustee for a trust for one of its residents or clients: they may need to charge the trust to fund care or services provided by it.

How can I protect the trust?

To help protect the trust against poor management by a trustee, it is a good idea to put in place ways of checking that the trustees are doing a good job.

Trustees are regulated by legislation but monitoring tends to be retrospective. This means it can be hard to tell in the short-term, at least, if the trust is being looked after well. You can check if the trustees are doing a good job by leaving a direction in your Will that the trustees are monitored.

You can include:

- who you want to review the trust accounts, such as a family member, friend or an administrator
- how often the trustees have to give the accounts to the person.

Alternatively, you can appoint an 'Appointer' for the trust who can monitor trustees and, if necessary, remove trustees and appoint new ones.

How can the trustees' decision be challenged?

If the person with disability is not happy with the trustees' decision, they can challenge it. The person can do this themselves (if the person has the capacity and is over 18 years of age) or the challenge can be through an administrator appointed by VCAT. If the person is under 18 years of age, a litigation guardian would make the challenge on the person's behalf.

They need to apply to the Supreme Court to:

- ask the court to decide if the trustees' action is within their power
- ask the court for a restraining order if there has been a breach of trust
- have a trustee removed from office.

If the trustees' actions are not monitored, a breach of trust is difficult to detect.

Trustees can be removed if:

- they live too far away from the beneficiary, for example, in another state or overseas
- they will not act or cannot carry out their duties
- they have acted in a way which is unethical or illegal.

Trustees cannot be removed because:

- the trustees did not want to exercise a discretionary power and there has been a disagreement
- the trustees and the person with disability are not getting along
- the trustees are being uncaring.

Challenging the actions of trustees can be a very expensive process. Even if an application is successful, the trust fund may have to pay for the application. It is advisable to obtain legal advice before going to court.

See 'Where to get help'.

What happens to Centrelink payments or other benefits?

If you set up a trust other than a special disability trust or the assets in the special disability trust exceed the current asset limits, the person's entitlement to Centrelink payments or other benefits may be reduced. The laws about trusts and Centrelink payments change regularly and are complex, for example, Centrelink can include income and assets from the trust when working out the person's entitlements. (This is not the case for special disability trusts.)

It is advisable to obtain legal advice about how your trust may affect the person's Centrelink payments.

See 'Where to get help'.

Establishing a death benefits pension for the person with disability

A person with disability qualifies for special treatment under Australian superannuation laws if they have disability that, while not necessarily severe for special disability trust purposes, has a need for support services and the disability has a significant impact on any one or more of the person's:

- communication
- learning
- mobility.

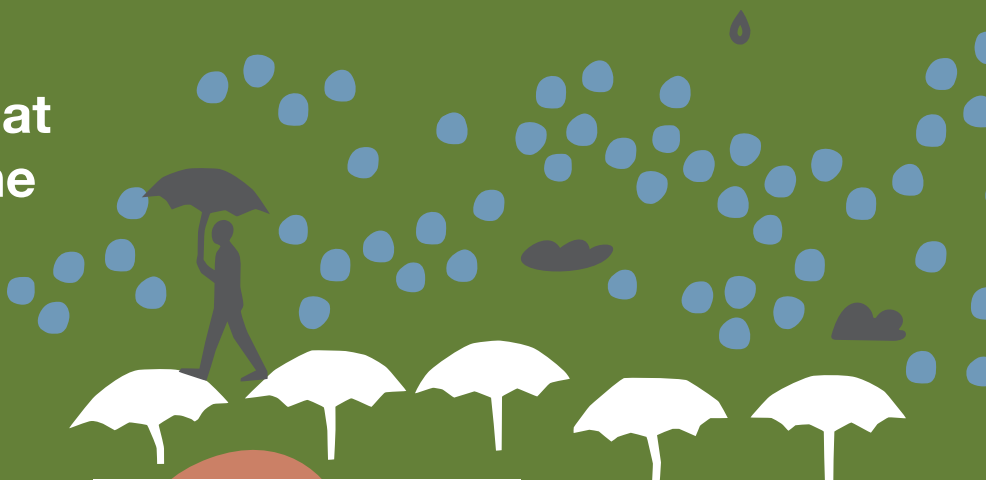
Such a person, regardless of age, is eligible to receive a death benefits pension from a parent's superannuation. If the parent was over 60 years of age at death, the pension can be income-tax free for the person.

The cooperation of the superannuation fund trustee is needed before such a pension is a possibility.

It is strongly recommended that financial and legal advice be sought before such a pension is put in place.

For Centrelink means-testing, such a pension has a similar impact to a personal inheritance and there are similar risks that the person could be persuaded to cash in the pension and lend or give the proceeds to unscrupulous people.

Deciding what to do with the family home



If the family home is only registered in your name or you are the surviving joint tenant, you can distribute it in your Will. When making your decision, you will need to think about what is best for the person with disability, if they are living with you.

Think about the following questions:

- What are the wishes of the person? If they are living in the house, it may be traumatic if they have to leave.
- Is my house suitable for the person and their level of disability? Can they live there on their own or do they need assistance?
- Is my estate large enough to provide for all beneficiaries without selling it?
- What kind of financial support will the person need?
- Will the person with a disability be able to afford the upkeep of the house?

Then you need to decide if you want to:

- leave the family home to the person with disability
- include the family home as part of the assets of a trust for your family member with disability (**See** 'Leaving your assets in a trust or superannuation pension')
- leave the family home to a service provider
- ask for the family home to be sold.

It is a good idea to talk to support services before you make a decision. You can also talk to your accountant, financial advisor or lawyer.

See 'Where to get help'.

Should I leave the house to the person with disability?

If you are thinking about leaving your family home to the person with disability, talk with workers who know about the person's needs. They can give you advice about what support services may help the person stay in the house.

Make your Will flexible enough to meet situations you may not have thought about. For example, the person may want someone to live in the house with them for support or extra income, their health may decline as the years go by and they may need additional assistance, or the house may become unsuitable. Consider if the person can afford to maintain the property and undertake repairs.

Should I leave the house to a service provider?

You may want to leave your family home to a service provider. A service provider does not have to look after the interests of the person, even if it is written in your Will. This option is usually not recommended. Before you contemplate doing this, it is advisable to obtain legal advice.

If you want the service provider to guarantee somewhere for the person to live in return for your home, you need to use a trust.

Under a trust, the service provider is allowed to use and occupy the house during the person's lifetime. In order to get the house, the service provider must show the trustees that they are looking after the housing needs of the person. Give the trustees absolute discretion so they can do something if the service provider is not usually meeting the person's needs. For example, the trustees can act if the service provider places the person in a Supported Residential Service instead of a smaller home with personalised care.

To avoid any conflict of interest, the service provider should not also be one of the trustees.

See 'Leaving your assets in a trust or superannuation pension'.

Should I get the executor to sell the house?

You may want an executor or the trustees to sell your family home if:

- the person cannot live in the house or does not want to live there
- they need to meet the financial needs of the person
- they need to provide for all beneficiaries of your wealth.

The money from the sale can be invested or used to buy another property.

Capital gains tax is usually only an issue with a family home if the home is not sold within two years of you last living there or two years from the date of your death. The capital gains tax exemption for your family home can also be extended where a family member is given the right to live in your property by a trust established by your Will.

Both a capital gains tax exemption and a duty exemption apply when a residential property is transferred to a special disability trust for the lifetime beneficiary to live in.

You should talk to your accountant, financial advisor or lawyer about these issues.

What to do next

Here is a checklist that may help you decide where to go from here.

- [ ] Decide if you need to apply for an administrator or a guardian for the person with disability, or whether applying for a supportive administration or supportive guardianship order could be a way that the person with disability could be supported to make their own decisions.
- [ ] Ascertain whether Centrelink considers the person to have severe disability, if you are considering the option of a special disability trust.
- [ ] Make a Will that takes care of the needs of the person with disability.
- [ ] Decide how you want your personal estate and superannuation to be shared among beneficiaries.
- [ ] Make sure your Will and superannuation nomination is flexible so the person with disability can benefit from your personal estate or superannuation if the person's situation changes.
- [ ] Decide if you want to leave assets directly to the person with disability in the form of a superannuation death benefits pension or a protective trust such as a special disability trust.
- [ ] If you set up a trust, choose suitable trustees (or a succession of trustees) who will outlive the beneficiary.
- [ ] Get the people involved in dealing with your estate to meet each other so they feel more comfortable working together.
- [ ] If you leave assets directly to the person with disability, decide who to nominate as an administrator.
- [ ] Decide who to appoint as executor for your Will.
- [ ] Decide who to nominate as residuary beneficiary if the main beneficiaries die, and who are to be the residuary beneficiaries of any special disability or protective trust.
- [ ] Consider capital gains tax implications.
- [ ] Decide where to leave your Will and other estate-planning documents and tell the relevant people, such as the executor or attorney.
- [ ] Decide if you want to arrange and pay for your funeral in advance.
- [ ] Decide if you want to use experts such as a lawyer, investment adviser or disability support organisation to help you make your Will.

What do these words mean

administrator (of a deceased person's estate)
a person appointed by either the County or the Supreme Court of Victoria, to distribute and deal with a deceased person's estate if there is no Will or where the Will does not name a suitable executor

administrator (for person with disability)
a person appointed by the Victorian Civil and Administrative Tribunal (VCAT) with power to make decisions about financial matter(s) on behalf of a person with disability who is unable to make those decisions for themselves

assets
things owned, such as property, land, shares, bank deposits, jewellery and clothes

attorney
a person appointed before 1 September 2015 under an enduring power of attorney (financial) to make financial decisions for another person, or a person appointed on or after 1 September 2015 under an enduring power of attorney to make decisions about financial and/or personal matters

beneficiary (of a Will)
a person who receives something from a deceased person's estate

beneficiary (of a trust)
a person who receives the benefit from a trust (see also 'lifetime beneficiary')

breach of trust
a decision or action of trustees that is inappropriate or outside the trustees' power

capital
the original assets in a trust, additional gifts made to the trust and financial appreciation of those assets and gifts

capital gains tax
tax on the profit made when selling assets bought after 19 September 1985

codicil
a legal document used to change part of a Will

decision-making capacity
A person with capacity can understand, retain, use and weigh up relevant information in order to make a decision, and can communicate their decision in some way

enduring power of attorney
a legal document made on or after 1 September 2015 in which a person appoints another person to make decisions for them about financial and/or personal matters. The power endures (continues) even if the person giving it loses the capacity to make decisions about matters

estate
the property a person owns outright or has an interest in

estate planning
planning what should happen to a person's estate on their death

executor
a person named in a Will to execute its instructions and deal with the estate including how to distribute any assets

grant of probate
a court order proving that the Will is that of the deceased person and allowing the executor of a Will to execute its instructions including how to distribute any assets and deal with the estate

guardian
a person appointed by VCAT with power to make decisions about personal matter(s) for someone who is unable to make those decisions for themselves

hearing
when a case is presented at court or a tribunal

intestacy rules
laws that state how assets are passed on if a person dies without a Will

joint tenants
a form of co-ownership where, on the death of one owner, the survivor automatically takes over full ownership of the property, regardless of the terms of the Will of the deceased

lifetime beneficiary
a beneficiary of a trust where the benefit ceases on their death

medical treatment decision maker
a person authorised under the Medical Treatment Planning and Decisions Act to make medical treatment decisions on behalf of a patient who does not have decision-making capacity to make that decision

NDIS Plan
National Disability Insurance Scheme Plan

personal estate
any property that is not real estate

principal
a person who makes an enduring power of attorney or a supportive attorney appointment

probate
the process of proving that a Will is the valid last Will of the deceased person

protective trust
a protective trust established for the whole of a lifetime beneficiary's needs and the needs of that person's children, but which does not qualify for means-testing concessions

real estate
land and interests in land (such as an interest in a right of way over another's property)

residuary beneficiary
a person named in a Will who gets everything left from the deceased person's estate, after distributing all the assets that have been specifically named in the Will

revoke
cancel

special disability trust
a trust that can hold funds, assets or property for a severely disabled person without affecting the disabled beneficiary's own means-testing for the Disability Support Pension. Up to $500,000 can be contributed by living immediate family members without affecting the donor's mean-tested Centrelink pension

supportive administrator/supportive guardian
a person appointed by VCAT to support another person to make and give effect to decisions about financial matters (supportive administrator) or personal matters (supportive guardian)

supportive attorney
a person appointed under a supportive attorney appointment to support another person to make and give effect to decisions about financial and/or personal matters

support person
a person appointed under the Medical Treatment Planning and Decisions Act to support another person to make and give effect to decisions about their medical treatment

testamentary capacity
the legal capacity to make a valid Will

Testator Family Maintenance (TFM) claim
A TFM claim is also known as Family Provision claim or Part IV claim. It is a claim that a person with a particular relationship to you, may be entitled to make against your estate after you die if they believe you have not left them a fair share of your assets.

Trust
a legal obligation that makes the trustees responsible for managing property for the benefit of another person

Trustees
individuals who manage, or a company (such as a professional trustee company) which manages, a trust

Will
a legal document that states who will get part or all of a person's estate after that person dies

Will-maker
a person who makes the Will (also called a testator if they are male or testatrix, if female)

Where to get help

Office of the Public Advocate (OPA)
Safeguards the rights and interests of people with disability.
Advice Service, Monday to Friday, 9am to 4.45pm
Level 1, 204 Lygon Street, Carlton, Victoria 3053
Ph: 1300 309 337
National Relay Service 133 677
Fax: 1300 787 510
publicadvocate.vic.gov.au

Action for More Independence and Dignity in Accommodation (AMIDA)
Level 1, Ross House, 247 Flinders Lane, Melbourne, Victoria 3000
Ph: 03 9650 2722
amida.org.au

Carers Victoria
Level 1, 37 Albert Street, Footscray 3011
Freecall 1800 514 845
carersvictoria.org.au

Centrelink—Disability, Sickness and Carers line
Centrelink—People with disability and carers
Answers enquiries about disability support pension, mobility allowance, sickness allowance, carer payment and carer allowance.
Monday to Friday, 8am to 5pm
Ph: 13 27 17

Centrelink—Older Australians
Answers enquiries about the age pension, Commonwealth Seniors Health Card and Pensioner concession cards.
Monday to Friday, 8am to 5pm
Ph: 13 23 00

Department of Health & Human Services, Disability Services Division
50 Lonsdale Street, Melbourne, Victoria 3000
Ph: 1300 650 172
dhs.vic.gov.au/for-individuals/disability

Law Institute of Victoria—Legal Referral Service
Level 13, 140 William Street, Melbourne 3000
Ph: 03 9607 9311
liv.asn.au/Referral

Probate Office
Supreme Court of Victoria
Level 2, 436 Lonsdale Street, Melbourne, Victoria 3000
Ph: 03 8600 2000 (option 1 for probate and wills)
probate@supcourt.vic.gov.au
supremecourt.vic.gov.au

State Trustees Limited
1 McNab Avenue, Footscray, Victoria 3011
Ph: 1300 138 672
statetrustees.com.au

Tandem
Representing Victorian mental health carers
Level 1, 37 Mollison Street, Abbotsford, Victoria 3067
Ph: 03 8803 5555
tandemcarers.org.au

Victorian Advocacy League for Individuals with Disability Inc (VALID)
An advocacy group for adults with intellectual disabilities and their families.
130 Cremorne Street, Richmond VIC 3121
Ph: 03 9416 4003, NDIS Hotline: 1800 655 570
valid.org.au

Victoria Legal Aid (VLA)
Free legal help by phone and information about Victoria Legal Aid services.
Legal Help, Monday to Friday, 9am to 5pm
570 Bourke St, Melbourne, Victoria 3000
Ph: 1300 792 387
legalaid.vic.gov.au

Victorian Civil and Administrative Tribunal (VCAT)—Guardianship List
Part of the Human Rights Division of VCAT. The list protects people 18 years of age or over who, as a result of disability, cannot make decisions for themselves.
Ph: 1300 01 8228
vcat.vic.gov.au

Villamanta Disability Rights Legal Service Inc
Deakin University, Waurn Ponds Campus
Building IB, Level 3, 75 Pigdons Road
Waurn Ponds, Victoria, 3216
Monday to Friday, 9am to 5pm
(closed Wednesday mornings between 9am and 1pm).
Phone legal advice line Monday to Friday 1pm to 3pm.
Ph: 5227 3338 and 1800 014 111 (freecall Legal Advice Line)
villamanta.org.au

Office of the Public Advocate

Office of the Public Advocate
Level 1, 204 Lygon Street, Carlton, Victoria 3053
DX 210293 Phone: 1300 309 337
NRS: 133 677 Fax: 1300 787 510

publicadvocate.vic.gov.au

state trustees

State Trustees Ltd
1 McNab Avenue, Footscray, Victoria 3011
Phone: 03 9667 6444 or 1300 138 672
Fax: 03 9667 6301

statetrustees.com.au