

# Securing their future

For parents of children with a decision-making disability



- ▶ Making enduring powers of attorney
- ▶ Applying for a guardian and administrator
- ▶ Making a Will and planning your estate



Office of the  
Public Advocate

 Victoria  
Legal Aid

Lawyers And  
Legal Services

# Securing their future

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### Produced by Victoria Legal Aid and the Office of the Public Advocate (OPA)

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#### Changes to the law

The law changes all the time. To check for changes you can:

- call the Victoria Legal Aid Legal Information Service on 9269 0120 or 1800 677 402 (country callers)
- read the 'new law' section on the Victoria Legal Aid website at [www.legalaid.vic.gov.au/683](http://www.legalaid.vic.gov.au/683)
- contact a community legal centre. Call the Federation of Community Legal Centres on 9652 1500 to find your nearest community legal centre.

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## Victoria Legal Aid

We are a state-wide organisation that helps people with their legal problems. We focus on helping and protecting the rights of socially and economically disadvantaged Victorians.

We have lawyers in offices in most major metropolitan and country regions. We also fund private lawyers to provide legal services to the public.

We can help you with your legal problems about criminal matters, family breakdown, family violence, child support, immigration, social security, mental health, debt and traffic offences.

Call us to find out how we can help you on 9269 0120 or 1800 677 402 (country callers).

## Office of the Public Advocate

The Office of the Public Advocate is an independent statutory body of the Victorian State Government, working to promote the interests, rights and dignity of people with a disability. It manages an advocacy and guardianship program (including private guardian support); provides an advice service for enquiries about matters such as powers of attorney, guardianship, and consent to medical and dental treatment; and supports three volunteer programs.

The Advocate Guardian Program provides statutory guardianship to Victorians who cannot make decisions for themselves, and advocates for the human rights for people with a disability.

The Advice Service provides information to people about the rights of people with a disability, their treatment and care; VCAT applications; administration and guardianship; enduring powers of attorney and enduring guardianship; and consent to medical and dental treatment.

The Office supports three volunteer programs – the Community Visitors Program, the Independent Third Person Program and the Community Guardianship Program.

Community Visitors monitor the quality of disability services in Victoria in order to safeguard the rights of vulnerable people. Independent Third Persons provide support for people with a cognitive impairment or mental illness who have contact with the police. Community Guardians act as independent guardians for Victorians with a disability who are unable to make decisions for themselves.

The Office also undertakes systemic advocacy through the development of policy and research, as well as through targeted communications to a range of stakeholders.

For more information visit [www.publicadvocate.vic.gov.au](http://www.publicadvocate.vic.gov.au) or call the advice service on 1300 309 337 for the cost of a local call.

# About this booklet

This booklet is written for parents of a child with a decision-making disability. A decision-making disability means that the child cannot make everyday decisions for themselves. This can be as a result of:

- an intellectual disability
- a mental illness
- acquired brain damage.

If you need to help your child make daily decisions, you may be concerned about their care if something happens to you. However, you can take action to secure their future.

This booklet gives you information about how to:

- make powers of attorney so someone can make decisions if you cannot do this yourself
- appoint a guardian or administrator to make decisions for your child when they turn 18
- make a Will so your assets are passed on in the way you have chosen
- plan your estate so that your assets are passed on in the most financially efficient way.

*Securing their future* is not a do-it-yourself kit.

You should get legal advice. Make sure that your lawyer knows about estate planning, as well as any specific issues relevant to your child with a decision-making disability. Accountants, investment advisers and the organisations listed at the back of this booklet can also help you.

See 'Where to get help'.

The law changes all the time. To make sure you are getting accurate information you can:

- call or visit the Office of the Public Advocate
- call the Victoria Legal Aid Legal Information Service
- read the 'Securing their future' page on the Victoria Legal Aid website at [www.legalaid.vic.gov.au/683.htm](http://www.legalaid.vic.gov.au/683.htm)

To help you, we have explained some words in 'What do these words mean?' at the front of this booklet. These words are also highlighted in **bold** the first time they appear in each section.

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## What do these words mean?

**administrator (of a deceased person's estate)** – a person appointed by the Supreme Court 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 a disability)** – a person appointed by Victorian Civil and Administrative Tribunal to make financial and legal decisions on behalf of someone with a disability who is unable to make those decisions for themselves

**agent** – another name for an attorney appointed under an enduring power of attorney (medical treatment)

**assets** – things you own, such as property, land, shares, bank deposits, jewellery and clothes

**attorney** – a person appointed to make financial, legal or medical treatment decisions for another person

**beneficiary** – a person who gets something from a deceased person's estate

**breach of trust** – a decision or action of a trustee that is inappropriate or outside the trustee's power

**capacity (legal capacity)** – having the ability to reason things out. You can understand, retain, believe, evaluate (that is, process) and weigh up relevant information

**capital** – the original assets in a trust

**capital gains tax** – tax on the profit you make when selling assets bought after 19 September 1985

**codicil** – a legal document used to change a Will

**discretionary trust** – a trust authorising the trustee to make decisions. The trustee may have absolute power to do whatever they think is in the best interests of the beneficiary or they may choose from a limited number of alternatives listed in the Will

**enduring power of attorney (financial)** – a document that allows a person to make financial and legal decisions for another person who no longer has legal capacity. This power of attorney can also start before the person loses legal capacity

**enduring power of attorney (medical treatment)** – a document that allows a person to make decisions about the medical treatment for another person who no longer has legal capacity

**enduring power of guardianship** – a document that allows a person to make personal or lifestyle decisions for another person who no longer has legal capacity

**estate** – the assets of a deceased person

**executor** – a person named in a Will to deal with the estate

**grant of probate** – a court order that allows the executor of a Will to distribute and deal with the estate

**guardian** – a person appointed to make lifestyle decisions for someone who is unable to make those decisions for themselves

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**hearing** – when a case is presented at court

**intestacy rules** – laws that say how your assets are passed on if you die without a Will

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

**protective trust** – a trust authorising the trustee to make decisions for a sole beneficiary

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

**revoke** – cancel

**special disability trust** – a trust that allows living family members to donate up to \$532,000 in income and assets without affecting the donor's mean-testing for a Centrelink age or service pension or the beneficiary's mean-testing for the Disability Support Pension

**testamentary capacity** – the mental ability (capacity) to make a valid Will

**trust** – a legal obligation, made by a Will-maker, that makes the trustee responsible for managing the assets from an estate for the benefit of another person

**trustee** – an individual, a group of individuals or company who manage/s a trust established under a Will

**Will** – a legal document that says 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

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## Making powers of attorney

Below is an introduction to enduring powers of attorney and guardianship. We also produce another free publication, *Take control – a kit for making powers of attorney and guardianship*. It has more information about each of the powers, the forms you need and how to fill them in. You can order this publication from Victoria Legal Aid's website at [www.legalaid.vic.gov.au](http://www.legalaid.vic.gov.au)

Enduring powers of attorney are legal documents. They allow you to choose a person to act for you if you cannot make certain decisions in the future.

You can make:

- an **enduring power of attorney (financial)** by appointing someone to make financial and legal decisions on your behalf, such as signing a legal document, selling property or doing your banking
- an **enduring power of attorney (medical treatment)** by appointing someone to make medical decisions on your behalf, such as agreeing to or refusing surgery
- an **enduring power of guardianship** by appointing someone to make day-to-day lifestyle decisions on your behalf, such as where you live and health care issues.

It is a good idea to make all three powers of attorney. Importantly, if you take care of a child with a decision-making disability, making an enduring power of attorney (financial) will allow for your **attorney** to use your **estate** to give financial support for your child as well as for you.

You cannot make an enduring power of attorney for your child. You can only make an enduring power of attorney for yourself.

Words in **bold** are explained in 'What do these words mean?' at the front of this booklet.

### Who can make a power of attorney (financial)?

To appoint someone as your attorney, you must:

- be 18 years of age or over
- have sufficient **capacity** to make the appointment.

This means when you make the appointment you must be able to understand what you are doing, such as:

- what sorts of powers the attorney will have
- that you can set conditions or limitations on these powers or give instructions to the attorney
- when and how the attorney will have the authority to carry out their duties
- that the power continues even though you have lost capacity yourself
- that once you lose capacity you may not be able to effectively oversee the attorney's work
- the effect the attorney's power could have on you and the things that are important to you
- how to cancel or change the arrangement in the future.

You must enter into the power of attorney freely and not because of pressure from others.

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## Whom should I choose to be my attorney?

Most adults with capacity can be your financial attorney. It could be a relative or a friend. You can also choose your lawyer, accountant or a representative from a **trustee** company, such as the State Trustees. You are giving this person significant powers, so it must be someone you trust to act in your best interests and carry out your wishes.

You normally have to pay your attorney if it is a **trust** company or professional, such as an accountant. If you appoint a friend or family member, you do not need to pay them. However, if you need to pay them, you should see a lawyer about how to arrange this.

## How do I make an enduring power of attorney (financial)?

An enduring power of attorney (financial) is easy to make. You can do it yourself. However, if your financial or legal affairs are complex, get legal advice. You can get more information and a copy of the forms in the free publication *Take control – a kit for making powers of attorney and guardianship* from Victoria Legal Aid's website at [www.legalaid.vic.gov.au](http://www.legalaid.vic.gov.au)

## How do I cancel an enduring power of attorney (financial)?

To cancel an enduring power of attorney (financial) you need to **revoke** it. You must still have capacity. There are a number of ways to revoke an attorney. They include:

- revoking all earlier enduring powers of attorney when you appoint a new attorney
- telling the attorney that their power is withdrawn
- destroying all earlier power of attorney forms and any copies of it
- putting the revocation in writing or filling in a revocation form.

You must tell your attorney that you have cancelled their powers. They can act on your behalf until they are told that they do not have authority.

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## Applying for a guardian or an administrator

If your child is over 18 and has trouble making everyday lifestyle, legal or financial decisions for themselves, they may need a **guardian** or **administrator**. Anyone with an interest in your child can ask Victorian Civil and Administrative Tribunal (VCAT) to appoint a guardian or an administrator.

Words in **bold** are explained in 'What do these words mean?' at the front of this booklet.

### What is a guardian?

A guardian is a person appointed by VCAT to make personal and lifestyle decisions for an adult who cannot make decisions for themselves. A guardian may be authorised to make decisions about your child's healthcare, where they live and what services they get. They do not take over the role of care-givers.

VCAT can decide to make a plenary order. This means the guardian can make decisions about all personal and lifestyle issues. This does not include financial matters.

However, usually VCAT will make a limited order. This means the guardian can only make decisions about specific areas. These could include:

- accommodation – where your child should live
- healthcare – medical and dental treatment decisions
- access to people – whom your child will live with
- access to services – what services they get and activities they are involved in.

A guardian must act in the best interests of your child when making a decision. This means they must:

- listen to your child's wishes, where possible
- respect family relationships, cultural backgrounds and confidentiality
- consult with anyone who has a real interest in your child's wellbeing
- encourage independence and support your child's development.

Your child does not usually need a guardian if they already have a valid **enduring power of guardianship**.

### Can anyone else make medical and dental treatment decisions?

Yes. A 'person responsible' can also give consent to most healthcare decisions for a person with a disability. A person responsible is the first person from the list below who is available, able and willing to make a decision about the proposed treatment.

▶ An **agent** appointed by the person with a disability under enduring power of attorney (medical treatment)

▶ A person appointed by VCAT to make decisions about the proposed treatment

▶ A guardian with healthcare powers appointed by VCAT

- ▶ A guardian with healthcare powers appointed by the person with a disability under an enduring power of guardianship
- ▶ A person appointed by the person with a disability in writing to make decisions about medical and dental treatment
- ▶ The person with a disability's primary carer, including carers getting a Centrelink payment but not paid carers or service providers
- ▶ The person with a disability's spouse or domestic partner
- ▶ The person with a disability's nearest relative over the age of 18, which means (in order of preference):
  - son or daughter
  - father or mother
  - brother or sister (including adopted persons and half-blood relationships)
  - grandfather or grandmother
  - grandson or granddaughter, uncle or aunt
  - nephew or niece.

Where there are two relatives in the same position, for example, a brother and sister, the elder is the person responsible. Contact the Office of the Public Advocate for more information.

See 'Where to get help'.

### Are there any medical decisions a guardian cannot make?

Yes. A guardian with healthcare powers (or any person responsible) does not have the authority to consent to medical procedures that are likely to lead to:

- infertility
- termination of pregnancy
- removal of tissue for transplants.

### What is an administrator?

An administrator is a person appointed by VCAT to make financial and legal decisions for an adult with a disability who cannot make decisions for themselves. This is different from an administrator appointed by the Supreme Court to deal with an **estate** where the person has died without a **Will**.

An administrator can:

- make decisions about managing your child's banking, investments or property and paying their bills
- sign legal documents and make other legal decisions about your child's property
- exercise the person's right to privacy in relation to estate matters.

They must also keep accurate records of all income and expenditure, and lodge annual accounts to VCAT for examination or auditing.

An administrator's financial interests must not conflict with those of your child. They must also act in your child's best interests. This means they must:

- think about what your child wants
- encourage your child to make their own decisions, look after their money and be independent
- encourage your child to get involved with the community
- help your child to look after their dignity and self-esteem.

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At least once every three years, often more regularly, VCAT asks the administrator a range of questions, such as:

- How well are you managing?
- Are you investing wisely?
- Are you too strict or not strict enough in making money available to the child with a decision-making disability?
- Are you checking up on how well the child is being looked after?
- Can VCAT help you in any way?

You can ask VCAT to appoint an administrator for your child. VCAT can also choose to appoint an administrator if your child directly inherits **assets** from your **estate** but cannot make decisions for themselves.

Your child does not usually need an administrator if they have a valid **enduring power of attorney (financial)**.

## How do I apply for a guardian or an administrator for my child?

You need to fill in the application forms. VCAT can send you the forms or you can download them from the VCAT website.

See 'Where to get help'.

The forms ask you to nominate a guardian and/or administrator. You can do this yourself. You can also let VCAT choose the person.

When you apply, you also need to attach reports from:

- medical, psychological or other experts to show your child has a decision-making disability
- any social workers, case managers, or other government department or service providers who have worked with your child.

After getting your application, VCAT sets a **hearing** date. Most applications are heard within 30 days. VCAT is not as formal as a court. Hearings are usually open to the public and generally take less than an hour. If VCAT agrees, a lawyer may speak for you at the hearing.

### Urgent applications are heard as soon as possible.

The Office of the Public Advocate and VCAT have a 24-hour emergency service. If VCAT thinks that a matter is urgent, a temporary guardianship and/or administration order can be made for up to 21 days. The order can be extended a further 21 days.

## How does VCAT decide whether to appoint a guardian or an administrator?

VCAT will only appoint a guardian or an administrator if:

- your child has a disability
- your child cannot make reasonable decisions because of that disability
- decisions need to be made now (not sometime in the future)
- there is no other way of making these decisions that would have less impact on your child's rights to make such decisions for themselves
- it will help promote your child's best interests.

VCAT must be assured that the guardian and/or administrator will act in your child's best interests. For this reason, VCAT prefers to appoint a person who is familiar with your child's values, beliefs, likes and dislikes, such as a parent, relative or friend. VCAT will look at the wishes of your child and family members in deciding whom to appoint.

The administrator and the guardian can be the same person. However, VCAT must decide that this would be in the best interests of your child.

If a suitable person cannot be found, VCAT can appoint:

- the Public Advocate as a guardian for your child
- an independent organisation like the State Trustees or a private **trustee** company as administrator.

## What if I do not agree with VCAT's decision?

If you believe VCAT made a wrong decision, you can ask for a rehearing based on the facts or merits of the application. For example, you may believe VCAT focussed too much on some evidence or ignored other evidence.

You need to apply for a rehearing within 28 days. A rehearing is heard by a more senior member of VCAT. They can:

- agree with (affirm) the decision
- change (vary) the decision
- make a new order.

Anyone, including your child with a decision-making disability, can:

- ask for a reassessment of an order made by VCAT if there are new facts or things change
- appeal VCAT's decision to the Supreme Court if there is an 'error of law'.

Anyone thinking about an appeal or rehearing should get legal advice.

See 'Where to get help'.

## How long does a guardianship or an administration order last?

An order may last for up to three years, although it is usually for a shorter period. All orders are reassessed by VCAT within three years. The order can be cancelled if it is no longer needed.

If the person appointed no longer wants to be the guardian or administrator, they can also ask VCAT to reassess the order. Another person can be appointed, if necessary. If your child dies, the order ends.

## How are my child's best interests protected?

To ensure that guardians and administrators act in the best interests of your child:

- they can ask VCAT for advice at any time
- private administrators must regularly send VCAT an account of your child's finances
- administrators cannot invest money in real estate or securities, apart from authorised trustee investments, without the approval of VCAT
- any person who believes that a guardian or an administrator is not acting in the best interests of your child can apply to VCAT for a reassessment.

Guardians and administrators are also accountable to VCAT for the decisions they make on behalf of your child.

### The Office of the Public Advocate can help you.

It has fact sheets in many languages on guardianship and administration. Private guardians can also contact the Office of the Public Advocate for advice.

See 'Where to get help'.

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## Making a Will

Making a valid **Will** is very important if you have a child with a decision-making disability. It is the only way to ensure your **estate** is passed on in the way you would have wanted.

If you die without a Will, your **assets** are usually passed on to your surviving spouse or partner and your children first, and then next-of-kin. These rules do not take into account how you want your child with a decision-making disability to be looked after. Think about how you would feel if people you never wanted to benefit end up with part of your estate.

Words in **bold** are explained in 'What do these words mean?' at the front of this booklet.

### What is a Will?

A Will is a legal document that says what you want to happen to your estate after you die. In your Will you can name who gets:

- assets, such as houses, cars, money and shares
- rights and powers, such as the right to appoint the **trustee** of a family **trust**
- specific belongings such as a violin, painting, books and photos.

A person you name in your Will is called a **beneficiary**.

Some assets, such as superannuation and life insurance, may not be passed on in a Will. These benefits may go directly to the person you nominated when you filled in the application forms. If you want to change the person you nominated, you will need to contact the company.

### Who can make a Will?

To make a Will you must be 18 or older. The only exceptions are if:

- you are married
- you are going to marry, for example, you are engaged
- the Supreme Court authorises you to make a Will.

You must also have **testamentary capacity**. This means that you must understand:

- the nature of the Will and the effect it has
- what assets you have and how much they are worth – you do not have to know their exact value, just enough to be able to decide who gets them.

If a person does not have testamentary capacity, it is still possible for a Will to be made. To do this, you need to apply to the Supreme Court. The court will look at a number of issues, such as:

- the size of the estate
- a draft of the proposed Will
- evidence about the person's wishes.

A court-made Will is a complex process. Get legal advice.

See 'Where to get help'.

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## How do I make a Will?

You do not need a lawyer to draft a Will. You can make a Will yourself by buying a do-it-yourself Will kit. However, if you have a child with a decision-making disability, making a Will can be complex. It is important to get professional help. A lawyer or a trustee company, such as the State Trustees, can help you prepare your Will.

To be valid, your Will must be:

- in writing
- signed and dated by you in the presence of two adult independent witnesses who are not mentioned in your Will and do not have a relationship to anyone who is named in the Will as a beneficiary
- signed and dated by the two witnesses at the same time and in your presence
- signed by all people using the same pen.

If the points above are not followed, your Will is not valid. The Supreme Court can still confirm your Will but this can take time.

If there is a question about your testamentary capacity to make a Will, ask a doctor to make a written assessment of your **capacity**. Attach this to the Will. Make sure the doctor is experienced in making these assessments.

You could also get:

- the witnesses to make a written note of their reasons for believing you have capacity
- 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. Take care to ensure that nothing is pinned, stapled or attached to the Will.

Keep the Will in a safe place, for example, with a lawyer, in a bank or in a safe. Tell your **executor** where the Will is kept. You can give them a copy in a sealed envelope.

### A Will can be written in a language other than English.

A certified translation is needed at the time of death. If it is written in English but the **Will-maker** cannot understand English, it will be important to get legal advice to make sure there is no dispute about what the deceased person wanted.

## Do I need an executor?

Every Will must have an executor. An executor is someone who deals with your estate after you die. The executor carries out the instructions in your Will, including passing on your assets to beneficiaries.

The executor may have to:

- collect all the assets and have them valued, if needed
- find out what debts you owe and pay them from the money made by selling your assets
- pass on the assets to beneficiaries
- arrange tax returns
- claim life insurance
- arrange the funeral
- take or defend legal action on behalf of the estate.

If the estate or family dynamics are complex, you may want an independent executor. Get advice about who might be the most suitable person. It can be a lawyer, accountant or trustee company.

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Think about having an alternate executor. They can step in if the executor is not available or decides they do not want to do the job. You can also choose joint executors but make sure they can work together. Whomever you choose, make sure they understand the job and can do it.

## Can I change my Will?

You can change your Will as often as you like. As a general rule, you should review your Will at least every five years. Many things can change over that time.

You may want to change your Will if:

- you change your mind
- a beneficiary, executor or trustee dies
- you take on new responsibilities
- you want to include new beneficiaries
- you have new assets.

You should make a new Will if you:

- buy a significant asset or investment
- get involved in a new business, company or trust
- marry (or remarry)
- separate from your partner
- divorce.

Marriage **revokes** (cancels) any pre-existing Will, unless it was made because you thought you would get married. Divorce 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, divorce also cancels this appointment. You should make a new Will by the time your divorce is final.

It is best to make a new Will, especially if the changes are big. However, if the changes are small, you can use a **codicil**. A codicil is an addition to a Will that is legally valid. If you choose a codicil, it is a good idea to get a lawyer to handle it.

## Can my Will be challenged?

Your Will can be challenged after you die if:

- you did not have the testamentary capacity to make a Will at the time it was signed
- you did not make the Will freely or your decisions were pressured by others
- a person whom you had a responsibility to provide for believes you have not left them a fair share of your assets. For example, a spouse, children or domestic partner.

If your Will is challenged on behalf of your child with a decision-making disability, the Supreme Court can look at whether adequate provision was made for your child. If it will improve your child's lifestyle, the court may order that a substantial share of the estate be given to your child.

An application to challenge a Will must usually be made within six months of the **grant of probate**.

The Supreme Court can change your Will if it is happy that:

- it does not carry out what you wanted
- a clerical error was made.

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

- your Will is properly prepared
- you give your partner and all your children a fair share of your assets, especially if they depend on you for support.

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## Do I need a lawyer?

If you have a child with a decision-making disability, it is best to use a lawyer or 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
- have young children
- own assets with another person, such as a house or joint bank accounts
- have a family business
- have assets that are interstate or overseas
- get income from a trust or a family company, or you are involved in a trust or a family company.

Most lawyers do Wills but some offer other services such as estate planning. Costs vary depending on what you need. For example, a complex Will that uses a trust will be more expensive. Get quotes first.

# Securing their future

For parents of children with a decision-making disability

## Planning your estate

Planning your **estate** lets you make sure you have provided for your child with a decision-making disability. It can reduce the risk of your family arguing about who gets what after you are gone.

Words in **bold** are explained in 'What do these words mean?' at the front of this booklet.

### 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 your child and any other beneficiaries.

Most people working in this area will do tax 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:

- How much will it cost me to set up? Are there any ongoing costs?
- What is the best option that will take care of the needs of my child with a decision-making disability?
- How am I going to protect the best interests of my child?
- Is there enough flexibility in case my child's situation changes?
- If my child cannot look after their financial affairs, who can help my child and what kind of powers do I want that person to have? Do I want to choose this person? How will I make sure they do their job?
- Am I concerned about what happens to my assets if my child dies after me?

If you have other children, you may also need to think about:

- the age and needs of each child
- whether they have any independent income or assets
- the relationship between the child with a decision-making disability and any children without disabilities.

If all your children are young, for example under 14, each child will need support. However, if your other children are adults and financially independent, you may want to leave more of your estate to your child with a decision-making disability. Make sure you talk to all your children about what you want to do.

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Thinking about these issues will help you decide how you want to leave your assets to your child with a decision-making disability. Some options are leaving your assets:

- directly to the child
- to the child and nominating an administrator to manage their financial affairs
- in a trust
- to a friend, relative or service provider in return for appropriate care of your child.

# Securing their future

For parents of children with a decision-making disability

## Leaving your assets to your child

You can leave your **assets** directly to your child with a decision-making disability in your **Will**. You can also nominate an **administrator** if you are worried about your child's ability to look after their financial affairs.

Words in **bold** are explained in 'What do these words mean?' at the front of this booklet.

### Leaving assets directly to my child

You can leave assets directly to your child if they are 18 years or over. This gives your child a chance to act as an independent member of the community. Community organisations can still give support if needed.

If your child cannot look after their inheritance, a family member or other concerned person can apply to Victorian Civil and Administrative Tribunal (VCAT) to appoint an administrator to make financial decisions on your child's behalf. This is different from an administrator appointed by the Supreme Court to deal with an **estate** where the person has died without a Will.

### Leaving assets to my child and nominating an administrator

If your child is 18 years or over and you are not sure if they can handle their own finances, you can still leave your assets to them. However, you can nominate a person in your Will whom you want to be appointed to help your child look after the assets. This person is called an administrator.

Although nominating someone in your Will is not legally binding, it is taken seriously. VCAT will make their decision based on what is in the best interests of your child. You will also need to direct the **executor** of your Will to apply to VCAT for an administrator.

The good reasons for using an administrator include:

- **VCAT has safeguards to protect your child's best interests**

A private administrator must lodge an annual account of the person's finances, unless there are rules that mean they do not have to. The account will be looked at by an examiner appointed by VCAT. The tribunal will also regularly check the administrator is acting in the best interests of your child

- **Administrators can ask VCAT for advice at any time**

Getting advice is free

- **Any concerned person can act to protect your child's best interests**

It is easy and inexpensive for a person who is worried about an administrator's actions to ask VCAT to reassess the situation

- **It is free**

There is no extra cost for using VCAT, just the cost of the Will.

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The not so good reasons for using an administrator include:

- **It may affect your child's Centrelink pensions and benefits because your money is owned by your child, not the administrator**

It may also affect your child getting a job or a home to live in. Talk to a financial planner if this is a concern

- **VCAT chooses who will be the administrator**

Although you can nominate an administrator in your Will, there is no guarantee that VCAT will appoint this person. VCAT will listen to other family members before it makes a final decision

- **You may not be able to control what happens to your assets if your child dies**

If your child does not have a Will, their assets may be automatically passed on according to **intestacy rules**. These rules say how the assets are passed on to surviving relatives. If your child has a Will, they may be influenced to leave their money to someone. If this is not what you want, speak to a lawyer and consider a **trust**.

## What happens to Centrelink payments and other benefits?

If you leave assets directly to your child, 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, with **special disability trusts**.

Being cut off a benefit may make life very hard for your child. Entitlements to a pension or benefit can mean more than regular income. They might also give your child the chance to be involved in an employment program or live in a certain home. You can get information about pension entitlements from Centrelink.

If you have a large estate, then it is worth thinking about using a trust. Get professional advice.

See 'Where to get help'.

## What happens to the assets when my child dies?

If your child with a decision-making disability has **testamentary capacity**, they can make a Will to pass on their assets. Even if your child is not capable of looking after their own finances, they may be able to decide whom they want to leave their assets to. The Supreme Court can authorise a Will to be made for your child.

If your child dies without a Will, assets will be passed on according to intestacy rules. This might mean that assets are passed on against your wishes. For example, the child's other biological parent can inherit assets, even if you are separated and they have not had much contact with your child.

# Securing their future

For parents of children with a decision-making disability

## Leaving assets to relatives or friends

You may be thinking about leaving your **estate** to your children without a disability, a relative or a friend and asking them to look after your child with a decision-making disability.

This is not the best way to go because:

- you have no control over the decisions the relative or friend makes
- 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 your child will not be thought about or get completely overlooked.

Also, if you make little or no provision for your child, your Will can be challenged in the Supreme Court. The court can order that your child gets maintenance and support.

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 whom you want to be appointed as **administrator**
- create a **trust** and appoint the relative or friend as a trustee or co-trustee.

Words in **bold** are explained in 'What do these words mean?' at the front of this booklet.



# Leaving your assets in a trust

Another way to look after your child with a decision-making disability is to create a **trust** in your **Will**. This allows you to:

- plan how your **assets** will be used and looked after
- have greater control over what happens to your assets
- choose the **trustee** or trustee company that you want to look after the trust.

Making a trust costs more than making a standard Will, as a trust is more complex. You should get help from a lawyer or a trustee company if you are going to include a trust in your Will.

Words in **bold** are explained in 'What do these words mean?' at the front of this booklet.

## What is a trust?

A trust is where a trustee is chosen to manage assets for another person. A trustee can be an individual, a group of individuals or even a trustee company, such as the State Trustees.

The trustee's responsibilities are set out in the Will. You can leave specific directions to the trustee in your Will. For example, you could ask the trustee to give your child a certain amount of money each year and set aside some money to pay for unexpected things.

You can also tell trustees 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 children
- give the extra income to a nominated charity.

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

## What are the different types of trusts?

**Discretionary trusts** and **protective trusts** are the most relevant trusts for parents of a child with a decision-making disability.

A discretionary trust can have more than one **beneficiary**. For example, your child with a decision-making disability and other immediate family members. However, the trustee has the power to pass on assets to any of the beneficiaries.

On the other hand, your child with a decision-making disability, and their children if they have any, are the sole beneficiaries of a protective trust. A protective trust allows the trustee 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 that child. The trustee does not have to give the money directly to the child.

Many parents who wish to set up a trust for the benefit of a child with a decision-making disability choose to set up a protective trust.

# Securing their future

For parents of children with a decision-making disability

## What is a special disability trust?

A **special disability trust** is a type of protective trust. Anyone can donate to the trust but immediate living family members who donate will have their personal income and assets reduced for the purposes of getting a pension. This means that if the family member is of age or service pension age then they may be able to get a higher pension. When Centrelink is deciding how much the family member's pension should be, Centrelink will take into account the donation and how much it has reduced the family member's income and assets. Before September 2006, Centrelink did not take this reduction of income and assets into account.

Immediate living family members can donate up to a total of \$532,000. Any more than this will not reduce their income and assets for the purposes of getting a pension.

A special disability trust has conditions:

- the trust and income earned from it can only be used to pay for the care and housing of a child aged 16 and older with a severe disability
- the trustee must lodge financial reports each year
- the trustee may have to do an audit if Centrelink asks for one. The trustee must use independent, qualified auditors.

Your child may have a decision-making disability but they may not be considered to have a severe disability. A key part of having a severe disability is that your child is over the age of 16 years and will most likely be unable to work.

A special disability trust can be set up by a lawyer on behalf of anyone who is an approved donor. It can be a part of the Will, as either an option for the **executor** or as a direction to the executor. It is important to choose a lawyer (or trustee company) who knows how to draft special disability trusts. You will only get Centrelink's exemptions/special benefits if the special disability trust fits in with their strict requirements.

For more information about special disability trusts, contact Centrelink's Financial Information Service.

See 'Where to get help'.

## What does a trustee do?

A trustee's duties and obligations must be clearly set out in the trust. Trustees are paid to carry out the things the trust says they should be doing. They can also get other payments specifically authorised in the Will.

An important part of a trustee's 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, this could be seen as a breach of the trustee's obligation. The trustee may have to pay for any of the **estate's** losses.

Trustees must keep proper accounts. You can ask for the accounts to be regularly checked in your Will. The beneficiary (or person authorised by them) can ask to see all information about the trust and investments. The trustee must give this information.

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

## How do I choose a trustee?

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

You can choose:

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

Before you choose, get legal advice.

See 'Where to get help'.

### Appointing an individual

You can appoint an individual to be a trustee. You can also appoint more than one trustee to help get a balanced outcome. For example, you could choose someone who knows your child, 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 spend any trust money.

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

- a person you know is 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 trustee companies.

If you want to appoint an individual as trustee, think about their age. There is no use appointing a sole trustee who is 20 or 30 years older than your child with a decision-making disability. You should appoint at least one person who is likely to outlive your child. Get advice about how to appoint an alternative trustee who can take over if the trustee cannot continue their duties.

You may want to appoint one or more of your children without a disability to act as a trustee. However, if you also want these children to be **residuary beneficiaries** in your Will, this may be a conflict of interest. If this is the case, 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 your child
- only appointing trustees who are not residuary beneficiaries under your Will.

### Appointing a private trustee company

There are Victorian laws to regulate the activities of private trustee companies. Some of the benefits of using a private trustee company are that they:

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

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 person can liaise with the private trustee company to make sure they act in your child's best interests.

Private trustee companies will charge for their services. Be aware that a trustee company may also charge for the consultation time with a relative or friend acting as a co-trustee.

You can contact private trustee companies through the Trustee Corporations Association of Australia.

See 'Where to get help'.





# Securing their future

For parents of children with a decision-making disability

## Deciding what to do with the family home

If the family home is only registered in your name, you can put it in your **Will**. When making your decision, you will need to think about what is best for your child with a decision-making disability.

Think about the following questions:

- What are the wishes of my child? If they are still living in the house it may be traumatic if they have to leave
- Is my house suitable for my child 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 the house?
- What kind of financial support will my child need?

Then you need to decide if you want to:

- leave the family home to your child with a decision-making disability
- 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'.

Words in **bold** are explained in 'What do these words mean?' at the front of this booklet.

### Should I leave the house to my child?

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

Make your Will flexible enough to meet situations you may not have thought about. For example, your child may want someone to live in the house with them for support or extra income.

### Should I leave the house to a service provider?

You may want to leave your family home to a service provider. This option is not the way to go. Before you do this, get legal advice.

A service provider does not have to look after the interests of your child, even if it is written in your Will. If you want the service provider to guarantee somewhere for your child 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 your child's lifetime. In order to get the house, the service provider must show the **trustee** that they are looking after the housing needs of your child. Give the trustee absolute discretion so they can do something if the service provider is not meeting your child's needs. For example, the trustee can act if the service provider put your child in a 30-bed hostel instead of a smaller place with personalised care.

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

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## Should I get the executor to sell the house?

You may want an **executor** or a trustee to sell your family home if:

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

The money from the sale can be invested or used to buy another property. You should talk to your accountant, financial advisor or lawyer about what happens with **capital gains tax** when your house is sold.

# Securing their future

For parents of children with a decision-making disability

## What to do next

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

- ▶ Decide if you need to make powers of attorney or guardianship  
.....
- ▶ Decide if you need to apply for a guardian or an administrator for your child with a decision-making disability  
.....
- ▶ Make a Will that takes care of the needs of your child  
.....
- ▶ Decide how you want your estate to be shared among beneficiaries  
.....
- ▶ Make sure your Will is flexible so your child can benefit from the estate if their situation changes  
.....
- ▶ Decide if you want to leave assets directly to your child/children or in a trust  
.....
- ▶ If you set up a trust, choose a suitable trustee who will outlive the beneficiary  
.....
- ▶ If you leave assets directly to your child, decide whom to nominate as an administrator  
.....
- ▶ Decide whom to appoint as executor for your Will  
.....
- ▶ Decide whom to nominate as residuary beneficiary if the main beneficiaries die  
.....
- ▶ Consider capital gains tax implications  
.....
- ▶ Consider what will happen to your superannuation  
.....
- ▶ Decide where to leave your Will and tell the relevant people, such as the executor  
.....
- ▶ 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  
.....
- ▶ Get the people involved in dealing with your estate to meet each other so they feel more comfortable working together.

# Where to get help



## If you need an interpreter:

Call the Translating and Interpreting Service for an interpreter to help you speak to any of the agencies in this section. Ask the interpreter to put you through to the agency you need. This is usually free.

Tel: 131 450



## If you are deaf or have a hearing or speech impairment:

Use the National Relay Service to phone any of the agencies (including Victoria Legal Aid) in this section. This is free. For more information about the NRS visit [www.relayservice.com.au](http://www.relayservice.com.au)

**TTY users:** Call 133 677 and then ask for the phone number you need. Include the area code.

**Speak and Listen users:** Call 1300 555 727 and then ask for the phone number you need. Include the area code.

**Internet relay users:** Connect to [www.iprelay.com.au/call/index.aspx](http://www.iprelay.com.au/call/index.aspx) and then ask for the phone number you need. Include the area code.

## Victoria Legal Aid

### Legal Information Service

Tel: 9269 0120 or 1800 677 402 (country callers)

Arabic: 9269 0127

Persian (Farsi): 9269 0123

Croatian: 9269 0164

Polish: 9269 0228

Greek: 9269 0167

Serbian: 9269 0332

Italian: 9269 0202

Ukrainian: 9269 0390

Monday to Friday between 8.45 am and 5.15 pm

You can also get an interpreter from the Translating and Interpreting Service if you speak another language. Call 13 14 50 and ask to be put through to Victoria Legal Aid.

### Local offices

We have offices all over Victoria. See the back cover for office locations and phone numbers.

### Website

[www.legalaid.vic.gov.au](http://www.legalaid.vic.gov.au)









# Securing their future

For parents of children with a decision-making disability

## Victoria Legal Aid

### Legal Information Service

Tel: 9269 0120

Country callers: 1800 677 402

### Offices

#### MELBOURNE

350 Queen St  
Melbourne VIC 3000  
Tel: 9269 0120  
Country callers: 1800 677 402

#### Suburban offices

#### BROADMEADOWS

North western suburbs  
Level 1, Building 1  
Broadmeadows Station Centre  
1100 Pascoe Vale Rd  
Broadmeadows VIC 3047  
Tel: 9302 8777

#### DANDENONG

Westernport region  
Level 1, 9-15 Pultney St  
Dandenong VIC 3175  
Tel: 9767 7111

#### FRANKSTON

Peninsula region  
Cnr O'Grady Ave & Dandenong Rd  
Frankston VIC 3199  
Tel: 9784 5222

#### PRESTON

North eastern suburbs  
42 Mary St  
Preston VIC 3072  
Tel: 9416 6444

#### RINGWOOD

Outer eastern suburbs  
23 Ringwood St  
Ringwood VIC 3134  
Tel: 9259 5444

#### SUNSHINE

Western suburbs  
1/474 Ballarat Rd  
Sunshine VIC 3020  
Tel: 9300 5333

#### Regional offices

#### BALLARAT

Central Highlands region  
Area A, Level 1  
75 Victoria St  
Ballarat VIC 3350  
Tel: 5329 6222  
Toll free: 1800 081 719

#### BENDIGO

Loddon-Campaspe region  
424 Hargreaves St  
Bendigo VIC 3550  
Tel: 5448 2333  
Toll free: 1800 254 500

#### GEELONG

Barwon region  
Level 2, 199 Moorabool St  
Geelong VIC 3220  
Tel: 5226 5666  
Toll free: 1800 196 200

#### HORSHAM

Wimmera region  
29 Darlot St  
Horsham VIC 3400  
Tel: 5381 6000  
Toll free: 1800 177 638

#### MORWELL

Gippsland region  
Cnr Chapel & George St  
Morwell VIC 3840  
Tel: 5134 8055

#### BAIRNSDALE

Gippsland region (branch office)  
101A Main St  
Bairnsdale VIC 3875  
Tel: 5153 1975

#### SHEPPARTON

Goulburn region  
36-42 High St  
Shepparton VIC 3630  
Tel: 5823 6200  
Toll free: 1800 119 918

#### WARRNAMBOOL

South Coast region  
185 Fairy St  
Warrnambool VIC 3280  
Tel: 5559 7222  
Toll free: 1800 651 022

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