Estate Planning

A Practical Guide to Generosity

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A Guide to Estate Planning for Christians

Many of us put off making or remaking a will because it forces us to think about difficult and confronting issues, such as our own mortality, our hopes for our relationships, and what might happen after our death, which we can't control. Christians however need to make well-planned wills as part of our responsibility to be stewards of the material things God has given us.

Preparing a plan for providing wisely for our dependents and giving generously to causes that God cares about is an important part of putting our faith and love into practice. To make a wise and godly plan we need to discuss the issues involved with our spouse, our closest friends and advisors. To avoid nasty disputes within our family after our death we also need to discuss our intentions and plans with family members before it's too late to do so.

The following guide to estate planning is offered to help you engage in this kind of planning and then to discuss your intentions with your family.

My approach to this area of practice is to provide fixed cost quotes for preparing your will but to engage in estate planning discussions with you for free as a Christian ministry. This means that you can discuss issues related to your estate planning confidentially in a relaxed way without worrying about the cost. The aim of my practice is to help you plan for generosity and to do that in a generous way myself.

To make your will you will need to provide your solicitor with quite a number of other details. These matters are covered in the guide within this planning booklet, entitled "Your Guide to Making a Will". Once you have planned what you want to do you can then use this further guide to instruct me to prepare your actual will.

Rev. John Altmann
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Using this Guide

The structure of this guide is to offer you a series of questions for discussion with your own closest family and advisors and space to record your tentative conclusions. I suggest you then pray about these tentative conclusions for a while asking for wisdom and guidance from God who promises to give us this generously and in abundance.

The key issues addressed in this guide are:

1. Providing well for your dependents

2. Fostering understanding of your plans and avoiding disputes after your death

3. Balancing up providing for family with giving generously to other Christian causes

4. Firming up your intentions and putting in place a definite legal structure

Providing well for your dependents

God reserves some of his harshest criticism in the bible for those who ignore the needy and especially the needy in their own family:

Anyone who does not provide for their relatives, and especially for their own household, has denied the faith and is worse than an unbeliever.
1 Timothy 5:8

Religion that God our Father accepts as pure and faultless is this: to look after orphans and widows in their distress and to keep oneself from being polluted by the world.
James 1:27

Near the cross of Jesus stood his mother, his mother's sister, Mary the wife of Clopas, and Mary Magdalene. When Jesus saw his mother there, and the disciple whom he loved standing nearby, he said to her, "Woman, here is your son," and to the disciple, Here is your mother." From that time on, this disciple took her into his home.
John 19:25-27

The general principle in scripture is that relational closeness and responsibility go together. The closer our relationship to someone the greater our responsibility for them.

Who is dependent on you? What kind of responsibility do you have towards them? How do you need to provide for that?

It is also true that giving and love go hand in hand. The Apostle Paul wrote that: *If I give away all of my possessions... but do not have love, I gain nothing.* (1 Corinthians 13:3)
Things that we give to others near to us are no substitute for love that is expressed and felt by our family members and friends.

Are there family members for whom you need to work out how to express love as well as what to pass on to them?

A good giver has to think not only about how much their dependents need for their welfare and benefit, but also about how much their heirs can properly manage. The prodigal son squandered all that he had received in unwise spending. He really stands for many of us who have the same tendency to abuse God's generosity towards us in selfishness. (Others of us might manage money very carefully and so think we're completely righteous. We might then resemble the prodigal son's older brother: incredibly careful, but still a long way away from having a heart like God's, full of mercy and generosity).

So we may need to be careful to give things to our children spread out over time, or only at a certain age, so that they can learn to manage it well and not squander their inheritance. Some beneficiaries may be under a serious disability and need to have their inheritance managed for them for life by other trustees.

Are you in danger of making your children lazy or irresponsible by inheriting wealth? It's worthwhile thinking through how best to help your children as early as possible in their life, when they may need it more than when they're older, as you may die when they are already in late middle-age.

What can your heirs manage well? What do they need now or soon? What kind of help do they most need in life when? Do you need to delay or spread out any distributions? Who will help them learn to manage wisely if you are not there?

In biblical times the transfer of assets from one generation to another was often accompanied by a spoken blessing that both looked back and looked forward. See e.g. Jacob's blessing of his sons in Genesis 49 and David's charge to Solomon in 1 Kings 2. Explaining reasons for why you would like to dispose of your estate in certain ways, talking through these issues in advance and encouraging your heirs in non-material ways are all important blessings that you can pass on.

How might you bless your heirs apart from just transferring assets without comment? What kind of encouragement and exhortation do you want to pass on to them? Have you considered writing to descendants and friends apart from a legal will? What would you want to say?

Fostering understanding of your plans and avoiding disputes after your death

Lawyers sometimes joke that, "where there's a will, there's a relative!" Sadly family disputes over the terms of a will are commonplace. The law provides for the possibility of challenge to wills that do not adequately provide for anyone who is dependent on the will-maker. The court has the power to rewrite the terms of the will to make adequate provision for dependents (directly reflecting the Christian principle of providing adequately for one's dependents and family).

However the ability to challenge the will is often used as a blunt tool for attacking issues of emotional unhappiness and perceived favoritism within families. The best way to avoid this stress being placed on your family is to adequately provide for dependents and to do the difficult work of talking to your family members face to face explaining your reasons.

You need to explain your various distributions including going over the values that have led you to various conclusions. Outlining the charitable causes and ministries you have supported through your life and may want to give generously to after your death will be a great help in getting your wishes respected rather than fought over.

What do you need to talk about with family members that is part of your plan for your estate? What values and causes you have supported do you need to explain to them further? How and when are you going to do this?

Giving generously to Christian causes

Your estate planning is a final but potentially ongoing act of stewarding all that God has given you. You have a wonderful opportunity to help others in a substantial way and to demonstrate that you care about the kingdom of God and about storing up treasure in heaven.

What Christian causes have you supported during your life that you would like to give ongoing support to?

You have to consider whether you need to specify how bequests are to be spent by any organization. It is usually much more helpful to organizations not to have restrictive terms put around bequests. But if you want the funds to be spent on particular longer term capital needs then its best to specify this.

The major issue you will have to work out is how much to give. If you are certain about the value of your estate then you can provide a specific $ figure for various causes. (It's possible to specify that this be adjusted upwards for inflation for each year between making your will and your death). Where you are less certain about exactly how much will be distributed by your estate it may be better to think about specific things and specific amounts that you want to give to your dependents and then distribute a % of your residual estate to other causes.

A major issue to consider is how to balance up your concern for the kingdom of God and your concern for your children and dependents? How much do you think you need to give to each?

Firming up your intentions

How and when will you discuss your ideas about what to do with your spouse, your friends or advisors, and your family?

How do you plan to pray about the wisdom and guidance from God that you need?

Once you have some sense of a more settled plan what do you need to do to put it into practice?

The details you need to provide to your solicitor and the practical further issues you need to have answers to are covered in the guide that follows on from this one.

A MONTH OF READINGS ON THE THEME OF STEWARDSHIP

Day	1	.....	Psalm 24:1-6
Day	2	.....	Genesis 1:26 -2:3
Day	3	.....	Psalm 100
Day	4	.....	Psalm 49
Day	5	.....	Exodus 13:1-16
Day	6	.....	Exodus 16:4 - 23
Day	7	.....	Exodus 25:1 - 9
Day	8	.....	Leviticus 19:9 -13
Day	9	.....	Leviticus 26:9- 20
Day	10	.....	Deuteronomy 8:1 – 9
Day	11	.....	Deuteronomy 8:10 - 20
Day	12	.....	Deuteronomy 15: 1 - 11
Day	13	.....	1 Chronicles 29: 1 - 9
Day	14	.....	1 Chronicles 29: 10 - 22
Day	15	.....	Isaiah 3: 10 - 26
Day	16	.....	Isaiah 60: 1 - 19
Day	17	.....	Proverbs 11: 24-25, 13:11, 14:20-21, 23, 31, 19:17, 24, 22:7 & 9
Day	18	.....	Proverbs 31:10 - 31
Day	19	.....	Matthew 6:1-4
Day	20	.....	Matthew 25:14 - 30
Day	21	.....	Luke 12:13 - 21
Day	22	.....	Luke 16:1 - 15
Day	23	.....	Luke 21:1-4
Day	24	.....	Acts 20:25 - 35
Day	25	.....	2 Corinthians 8:1 - 15
Day	26	.....	2 Corinthians 9:1 - 11
Day	27	.....	Ephesians 5:1 - 5
Day	28	.....	1 John 3:16 - 18
Day	29	.....	1 Timothy 6:6 - 10
Day	30	.....	Revelation 18:17 – 20 & 21:9 - 21
Day	31	.....	1 Timothy 6:17-19

"The earth is the LORD'S and everything in it, the world and all who live in it" Psalm 24:1

"Command those who are rich in this present world ... to do good, to be rich in good deeds, and to be generous and willing to share"
1 Timothy 6:18

Your Guide to making a Will

Once you have decided how you want to dispose of your estate, the way you achieve this is by making a valid will. This guide is intended to provide you with information about some of the detailed decisions you will have to make. For me to advise you and draft a will that puts your plans into action you will need to fill out the attached information and instructions sheet.

This guide provides information about some of the key areas in which you need to instruct me. The guide itself is **not** legal advice to you. The guide is intended to help you instruct me so I can efficiently and correctly give you legal advice that takes into account your situation.

I suggest that you read through this guide and then take the “Information and Instructions Sheet” and fill out as much of it as you can, tear it out of the booklet and forward it to me.

My approach is to provide fixed cost quotes for preparing your will and to engage in preliminary estate planning discussions with you for free as a Christian ministry. The aim of my practice is to help you plan for generosity and to do that in a generous way myself. Once you have filled out the information and instructions sheet I will be able to confirm the cost of making your will. But as a general guide I charge $1500 - $2,000 for a complex situation needing advice about asset protection and setting up testamentary trusts and $700 - $1000 for a simpler will. These prices include identical wills for a couple.

You might also like to consider making enduring powers of attorney in relation to your guardianship and financial affairs should you become incapacitated in the future. This can be done alongside your wills for $300 for the power of attorney that you need. A separate information and instruction sheet regarding such powers of attorney is also part of this booklet.

Capacity to Make a Will

To make a valid will, the will-maker must have the mental capacity to understand all that they are doing and its implications. Therefore if you are helping a family member who is very frail or sick, recently diagnosed with any form of dementia or who appears in any way confused about their instructions, we will have to get an assessment from a doctor of the client's mental capacity. In these circumstances if the doctor certifies that the person has capacity to properly understand their will and give instructions it would be normal to ask the doctor to be one of the witnesses of the will.

On a related note it is now possible for you to appoint people with powers of attorney to act for you in relation to your guardianship and care, financial affairs and medical intervention if you become incapacitated in the future. This is well worth putting into place at the same time as making your will.

The Effect of Marriage and Divorce on your Will

The general principle is that a will is made void by the will-maker marrying and so you need to make a new will upon marriage or remarriage. Gifts or appointments in a will to a former spouse are revoked upon getting divorced but the rest of the will remains in force. Wills **can** be made explicitly in contemplation of a marriage and will be valid and continuing if that marriage then actually takes place.

If you have recently separated the family court has extremely broad powers to divide up assets between partners. Once you have obtained a binding financial agreement you need to remake your will for your new situation. Prior to the final settlement of your financial affairs with your spouse or de facto partner you should also remake your will to remove the possibility of your property failing to benefit those you would most like to receive it.

What Assets Form Part of your Estate?

Property held in common with your spouse will pass directly to him or her by right of survivorship and does not form part of your estate. This is most likely to apply to your principal shared residence. If your house is not owned jointly with your partner then you will have to think about how to deal with it on your death. Options include: gifting it to your partner; giving them a life interest in the property and then passing it on to someone else; or creating a right of residence trust for your partner for a specified period usually shorter than their lifetime.

Trusts are not your property. So even if you are the principal beneficiary or control a family or testamentary trust it is not part of your estate to distribute. You have to deal with trusts by way of the power to appoint future trustees to succeed

you or by distributing trust property to yourself before you die. But if you have **a loan account** with the trust then that debt is an asset that you need to distribute via your will. You may like instead to make provision to forgive such a debt to enable the trust to continue.

Likewise **Superannuation** is a trust asset and is not part of your estate. Your super needs to be dealt with by way of a binding death benefit nomination given to the trustee of the fund. Your superannuation death benefits have to be paid out of the super fund by the trustee in accordance with your nomination. In the absence of a binding nomination form your super can be paid either to your estate or directly to a dependent of yours at the discretion of the trustee.

The tax treatment of super fund death benefits depends on who receives them, and can be a major part of effective planning of your affairs. Broadly the treatment is as follows:

Lump sum payment to a dependent - Free of tax

Lump sum payment to a non-dependent - assessable in the hands of the recipient with different parts of the super accumulation taxed at different rates

Lump sum payment to your estate - distributed according to the will and taxed according to whether it is ultimately received by a dependent or not as above

Income stream paid to a dependent - If either you or the dependent is over 60 then the income stream is generally tax free. If both of you are below 60 years old then only the tax free component of the death benefit remains tax free

Income stream paid to a non-dependent - this will be taxable as ordinary income without any concessions

The most certainty is obtained by making a binding death benefit nomination to the trustee of your super fund. This also achieves an earlier payout as the super death benefit is paid directly to one of your dependents and is not subject to the processes involved in administering your estate. This nomination needs to be confirmed in writing every three years to ensure it does not lapse. A nomination can split the death benefit into different proportions if you wish. The exact planning of your nomination may require advice from your accountant or financial planner to gain the most tax effective result. It is possible to direct your executor to exercise a discretion to adjust amounts received by different beneficiaries to equalize their after tax position taking into account super distributions made outside the will.

Family company property is not part of your estate but **the shares in a company** are property that needs to be dealt with via your will.

After dealing with trusts and superannuation you are left with all your personal property, land, houses, money and investments in your own name, plus rights to any ongoing income to deal with.

Personal and Sentimental Items of Property

You may have particular possessions that you wish to leave to certain beneficiaries. These will need to be specified with appropriately certain descriptions as particular bequests. You need to be aware that if something has been given away by you or sold before your death then this bequests will have no effect. Where the items are not of huge value this can be dealt with also by leaving a well-documented list with your executor and next of kin. However in our opinion you should avoid setting out long lists of specific assets. This is because these lists of things can cause unnecessary disputes about your will where they have gone missing, worn out or been broken in the meantime. It is also wise to sit down with intended beneficiaries together to discuss the meaning of these particular bequests, as the meaning you put on particular possessions may not be the same as the significance of this particular gift in the perception of various other family members.

Loans or Gifts made during your Lifetime

You may need to consider advances made to particular beneficiaries during your lifetime by way of either loans or gifts. This will be relevant to weigh up the need for equality between children or to recognize extra obligations to a particular beneficiary. If you want to avoid disputes between siblings, where there are loans or gifts that have been made to one and not the other, it may be necessary to document these in writing or in enforceable contracts. The possibility of a child's marriage breaking up and property being divided between the partners can also be a good reason to consider making an enforceable contract for recovering your moneys as a debt.

Taxation and the Estate

In general until the estate is fully administered income tax will be payable upon anything earned by the estate. The executor will be responsible for organizing estate tax return(s). The executor will also have to get a final personal income tax return prepared for the will-maker.

The transfer of assets into the name of the executor does not give rise to capital gains tax. Nor is there a capital gains tax event caused by the transfer of an asset to a personal beneficiary. The beneficiary inherits the cost base for the asset of the deceased. In the case of pre-CGT assets or the deceased's principal residence the beneficiary inherits a new cost base of the market value of the asset at the date of death.

If the executor sells assets to meet estate costs or to pay moneys to a beneficiary a capital gain or loss may arise. The executor has to use the cost base of the deceased plus any further costs incurred since the date of death.

Where assets are left to charitable purposes capital gains tax may be payable. Assets gifted to a tax exempt entity such as a church or charity pass with capital gains tax to be paid by the estate based on the gain applicable up until the date of death. There is an exception to this rule for Tax Deductible charities (DGR's) who can receive moneys from the sale of an asset and the estate is exempted from paying CGT on the gain incurred to satisfy the testamentary gift. So in general it is better that exempt tax payers be left money rather than assets in the knowledge that this will come out of the entire estate after any capital gains tax has been paid.

Protecting Assets for Beneficiaries

Where significant amounts of money are involved and there is some risk to passing it directly to one or all of your children or another beneficiary then the establishment of testamentary trusts can be of significant benefit. The person who is the beneficiary of a trust does not actually own the property in the trust even if they control the trust. So if they become bankrupt or experience significant business losses or are sued for professional negligence the assets in the trust are protected. Testamentary trusts are also a way of preserving capital for grandchildren while still giving significant benefits to earlier generations.

Assets subject to trusts cannot be tied up like this for more than 80 years. Neither can they be shielded from the powers of the Family Court to take them into account in determining a financial settlement between partners whose relationship breaks down.

Testamentary trusts also provide significant tax benefits for children or grandchildren under 18. Income distributed from these trusts and spent on maintaining the children in life or education is tax free up to the normal income tax thresholds. The same treatment of income distributed from trusts established during your lifetime is not available.

There are also special forms of protective trusts available for children with a severe disability that can be set up during your lifetime or by your will, which

have certain benefits for you and your disabled child maintaining your social security entitlements.

Who is to be the executor?

The task of the executor is to bury your body, gather in the assets of the will-maker and safeguard them, pay all your debts and then administer the estate according to the terms of the will. While doing this they hold all your assets as trustees. The executor may or may not be the trustee of specific trusts set up under your will. These specific trusts can have different trustees. It is also important to provide for an alternative executor if your first choice cannot or does not complete the task or pre-deceases you.

The will-maker should appoint executors who will be fair and even-handed in administrative decisions where there is a balance to be maintained between different beneficiaries in complex family situations. Qualities an executor needs are honesty, common sense, and some financial and business knowledge. Where conflict may be envisaged, strength of character to live with unpopular decisions may be necessary and there may be a good case for the appointment of professional advisors to the position. The willingness of a person to act and their age will be relevant especially if there are long running trusts for beneficiaries set up under the will. It is also possible to appoint more than one person and provide for how they are to reach decisions where they are not unanimous.

Where needed for particular reasons, after discussion with you, I am prepared to accept appointment as your executor. However this option will involve substantial costs to the estate as I will charge for my time spent on all aspects of the administration of the estate at my then current normal charge rate. In complex estates I am always available to give advice to the executors or to act for them in parts of the administration at normal professional rates.

Guardianship of Your Children

If you have young children you can express your wishes as to the guardianship of the children in your will. Guardianship can be an onerous responsibility that may require the de facto adoption of your children into the guardians' family. The legal guardian of your children has significant responsibility regarding decisions that influence the children while they grow up. Your directive in the will is not binding on everyone and can be overturned by the Family Court.

Proper provision needs to be made in funds set aside in trust for your children if they are under 18 (or older if you wish e.g. up until they are 25) for your executor or a specific trustee to advance money for their maintenance, education and welfare. In this regard it is also possible to create a right of residence trust in your family home to enable children to continue to live there or for provision for loans

from estate trusts for children to be made to help with the cost of buying or renovating other accommodation.

Disposing of your Body

You can make provision for how you would like your body to be disposed of in your will and this will generally be effective. It will be very helpful to your family and to your executor if you have more specific funeral wishes, plans or suggestions if you leave these in written form with a number of people. Your funeral expenses come out of the estate and are usually the responsibility of the executor to pay.

Instructions and Information Sheet for Making your Will

Date: ……..

Will-maker's full name:……..

Do you have assets in any other names?.....

Do you have assets in the same name with a different spelling?
If yes, what?.....

Occupation:……..

Residential address:…….

……

Date of birth: ……. Place of birth:……

If not born here, when did you come to Australia?.....

Medical assessment
Current state of mental and physical health:……

……..

Matrimonial status
Currently:…… Full name of spouse: …….

Previous divorce or de facto relationship:
When?..... Name of partner ……..

Was there a property settlement?.....

Spouse or child maintenance?.....

Previous Will
Do you have a current will? ……

Where is it?.....

What does it do broadly?.....

Do you have a will in another country?.....

Client income approximately
Pension:……..

Centrelink benefits:……..

Employment:…….

Salary:…….

Superannuation
Any superannuation fund?.....

How much accumulated? ……..
Is the fund self-managed?.....
What is the public fund?.....

Is there any applicable death benefit or life insurance?.....

Who has the trust deed of the fund?.....

Other personal property

Share portfolio:……

Rental Property:……

Do you have assets or income outside of Australia?.....

Jointly held property
Family home or other real estate:
Is this held as tenants in common or joint tenants?.....

Mortgages:…….

Bank accounts:……

…….

Term deposits ……

Property in your own name

Real estate: ……

When was the property acquired?.....

Where is the title?.....

Do you have mortgages or charges over any of your property?
Details? ……

…….

Other property?

Life insurance:
Policy details: …….

Cars: ……

……..

Valuable household effects:…….

Loan accounts with family trust or company?.....

Other debts to you?.....

Other investment assets?.....

……

Family company or business
Do you have a continuing business by way of a company or partnership?

Ownership structure:……

Name and ABN/ACN:…….

Who has up to date constitution, copies of accounts and balance sheet?

Name and address of entities accountants:……..

……

Family or testamentary trusts
Are there trusts in which you are a beneficiary?.....

A trustee?.....

Who prepares the accounts for these?.....

What are the latest accounts that you have?.....

Who has the trust deeds?.....

Liabilities
Secured borrowings other than house mortgage?

Moneys you owe to family company or trust?.....

Credit cards?.....

Household debts?
Personal loans ……

Income tax debt? ……..

Is your occupation risky and likely to involve commercial claims? ……

Personal household particulars
Full name of de facto partner: …….

Together how long? ……..

If partner, how were major assets acquired after cohabiting? ……

……

Children
Full names and date of birth: …….

…….

……

State of health: …….

Children's income? …….

Child support/maintenance: ……..

Are children still dependent and being educated?.....

Guardianship until they are 18:…….

Have money advances been given to any child?
If so when and how much: …….

Has any one child or children done more than normal for their parents? …….

…….

Other persons to whom you have a responsibility

Who and how? ……..

Instructions for your will

Executor(s) name and address: …….

……..

Separate trustees for any portion? …….

……

Appointment of new trustees to any continuing trust: ……

……

Particular legacies or bequests: …….

…….

……

Particular ways of dealing with real estate? ……

……

Charitable intentions: ……..

……

……

Way of dealing with remainder of your estate? ……..

……..

…….

……..

Particular powers or trusts?.....

…….

…….

Wishes regarding Disposal of your body: …….

……

Have you communicated/written down any funeral wishes? …….

……

Establishment kit for your will: What to do next

You need to:

- review the Will document that we have produced and make certain it is relevant and accurately sets out your intentions; and
- arrange for the document to be signed, dated and witnessed in the way set out in this *Will Establishment Kit*. You can find the instructions for the signing of your will on the next page.

Questions or further information

If you have questions please do not hesitate to contact John Altmann on 03) 9813 1955.

Requirements for a valid will

Each Australian state and territory has legislation which sets out the requirements of a valid Will. Generally, in order to make a valid Will, the will maker (sometimes called the 'testator') must be at least 18 years old;

- have a sound mind, memory and understanding (capacity);
- intend to make a Will;
- know and approve of the contents of the Will; and
- follow procedural formalities set out below

The procedural legal requirements for making a valid Will vary between the states and territories. You need to arrange for the Will to be signed, dated and witnessed – ***the following process that complies with the requirements of all states and territories must be followed.***

Instructions on the signing of the Will

1. The will maker needs 2 adult witnesses who should be independent (not a beneficiary or the spouse of a beneficiary).

2. The will maker and the 2 witnesses should all be present in the same place and at the same time, when the Will is signed. This is to ensure that each witness can say that he or she saw and witnessed the whole of the signing process.

3. The will maker and the 2 witnesses must all use the same pen.

4. The will maker and the 2 witnesses must sign the Will on the same date and insert that date on the Will.

5. As to the actual signing:

Will maker

5.1 first, sign the bottom of each page;

5.2 second, on the final page of the Will sign adjacent to the brackets next to your name; and

5.3 third, insert the date including day and month in the space provided.

Witnesses

5.4 first, the first witness must sign the bottom of each page;

5.5 second, on the final page of the Will the first witness must sign and then write (clearly) his or her full legal name, current residential address and current occupation in the space provided; and

5.6 third, the second witness must then follow steps 5.4 and 5.5.

This completes the signing process.

6. Do not attach anything to the Will. No pins, staples or glider clips should ever be attached to the Will.

Who can be a witness?

Anyone can be a witness – as long as they are:

- at least 18 years old;
- not a beneficiary of the Will;
- not related to or engaged to marry a beneficiary of the Will (this is a prudent requirement, not a legal requirement); and
- able to see.

How many copies should be signed and witnessed?

The will maker only needs to sign one Will document. You can make as many copies of the original document as you like. You should give a copy of the signed will to your executor(s) with written instructions as to where the original is being stored.

Does the will need to be registered anywhere?

No, the Will does not need to be registered.

Where should the documents be stored?

The original signed document should be stored in a secure place such as the safest custody place in your own home or a bank safe custody.

The will maker should make sure he or she lets their executor(s) know where their Will is kept. Those people need to be able to find the document. Over the page is a sample letter that you might like to use to tell the executor where the original will is.

Sample letter to Executor

[Executor name
Address]

[Date]

Dear ,

Thank you for agreeing to administer my estate for me.

A copy of my current will is attached. Please don't hesitate to get in touch if there is anything in it that is confusing.

The original document is stored at ……
In particular you will find it in [insert place].

Yours sincerely,

A Guide to Powers of Attorney

An enduring power of attorney is a legal document where an individual appoints another person, called the ‘attorney(s)’, to make decisions for them about:

- **financial matters**
- **personal matters**
- both financial and personal matters or
- specific financial and/or personal matters.

The power ‘endures’. This means that it continues even if and when the person loses capacity to make their own decisions about matters. The attorney’s decisions have the same legal force as if the person who appointed them had made them. Enduring powers of attorney are made under the *Powers of Attorney Act 2014*. There is a standard form now which must be used in making a personal and/or financial power of attorney.

The person who makes the appointment (known as the ‘principal’) must be 18 years of age or older and have decision making capacity to make the appointment.

The person making the enduring power of attorney needs to decide:

- what powers to give
- when the power starts
- who to appoint.

What power to give

The principal decides the types of decisions their attorney(s) can make. These can be decisions about:

- all financial matters

- all personal matters
- all personal and financial matters.
- Or the principal can limit the attorney(s)' power to making decisions about specific financial and personal matters.

Financial matters include any legal matter that relates to the financial or property affairs of the principal.

Examples of personal matters are health care matters, including whether to consent to medical treatment, access to support services and where and with whom a person lives.

Conditions or instructions

The principal can place conditions on the exercise of the power by the attorney(s) and can give instructions to the attorney(s) about the exercise of the power.

Things an attorney can't do

An attorney appointed for all personal matters has power to consent to medical treatment but does not have the power to refuse medical treatment. Only a medical agent appointed under an enduring power of attorney (medical treatment) or a guardian appointed by the Victorian Civil and Administrative Tribunal (VCAT) with power to make decisions about medical treatment can refuse medical treatment on behalf of another person.

An attorney does not have power to do the following things on behalf of the principal:

- vote
- make decisions about the care or wellbeing of their children
- make (or revoke) a will
- make (or revoke) an enduring power.
- consent to marriage or a sexual relationship or dissolution of a marriage
- make decisions about adoption of a child
- enter into surrogacy arrangements
- manage the estate of the principal on their death
- consent to an unlawful act.

Things an attorney can't do unless the principal has authorised this

An attorney under an enduring power of attorney is only entitled to be paid if the principal has authorised this. This means that if the principal wishes to pay their attorney, they need to authorise this in the enduring power of attorney.

If the principal wants the attorney to provide for the financial needs of their dependant(s) they should authorise this in the enduring power of attorney.

An attorney for financial matters can't enter into a transaction where there is, or may be, a conflict between the duty of the attorney to the principal and the interests of the attorney, unless the principal has authorised this transaction. An example would be the enduring attorney offering to buy the principal's residence if the principal moved into full time residential care. A principal should certainly consider getting legal advice before authorising their attorney to enter into a transaction with a conflict of interest.

Who to appoint

The most important decision when making an enduring power of attorney is choosing who to appoint. The principal should appoint a person (or people) as attorney(s) who the principal trusts to manage their affairs and fulfil the duties of an attorney.

The principal may appoint more than one attorney and specifies the matters for which each attorney is to act.

If the principal appoints more than one attorney (for all or any matters) the principal can decide how the attorneys will make decisions.

The principal may appoint the attorneys to act:

- jointly — the attorneys must make decisions together (and all sign any document)
- jointly and severally — the attorneys can make decisions together or independently (and either all sign any document, or one attorney alone can sign any document)
- severally — the attorneys can make decisions independently (and one attorney alone can sign any document)
- by a majority — a majority need to agree to make a decision (and the majority who agree sign any document) or
- alternately – the attorney acts as a replacement for another appointment if that first attorney is unable to act.

If the principal does not specify how the attorneys are appointed, the attorneys are taken to be appointed to act jointly. When making this choice consideration should be given to ensuring this is workable.

When the power starts

The principal can nominate in the appointment form when the attorney(s)' powers start.

This can be:

- immediately
- when the principal ceases to have decision making capacity for the matters or matter
- another time, circumstance or occasion.

The principal can specify that the power start at different times for financial and personal matters. Or the principal can specify that the power start at a different time for a specified matter.

For example, the principal may choose for the power to start:

- immediately for financial matters
- when the principal ceases to have decision making capacity, to make decisions about personal matters, for personal matters.

If the principal does not specify when the power starts, it begins immediately for all matters. If the power begins immediately while the principal still has decision making capacity for matters, the principal oversees the use of the power and the attorney acts at the direction of the principal.

If the power comes into effect when the principal ceases to have decision making capacity for the matter(s) then the attorney may be asked to show evidence of this, such as a medical certificate.

What if the person giving the power is outside Victoria?

This power is for use in Victoria, Australia.

If you need a power of attorney for another Australian state or territory, or for another country, then it is likely that you will need to make a power of attorney under the laws of that place.

Although the laws of some other states and territories in Australia may give effect to this power of attorney, you should not assume this will be the case. Instead,

you should get legal advice about whether the laws of the state or territory concerned will in fact recognise this power of attorney.

What sort of decisions can the personal attorney make?

The personal attorney can, on behalf of the person who appointed them, make decisions about all health care and lifestyle matters. That includes deciding about the person's health care — in particular, whether to consent to, or to refuse, medical or dental treatment. However, in some circumstances, the guardian's refusal can be overruled by the person's medical practitioner — the relevant circumstances (and a possible solution to enable complete refusal) are explained under the next sub-heading.

What are the considerations and solutions around the personal attorney refusing medical or dental treatment?

Even if a personal attorney refuses medical or dental treatment that has been proposed for the person who appointed them, that person's medical or dental practitioner may provide the treatment if:

- the practitioner believes on reasonable grounds that it is in the person's best interests for them to receive the treatment; and
- the practitioner gives the personal attorney the opportunity to arrange for the Victorian Civil and Administrative Tribunal to resolve whether the treatment should be given (or not).

How can the person appointing the personal attorney arrange for someone to be able to overrule the practitioner?

If the person appointing the personal attorney wishes to arrange for someone to be able to overrule the practitioner (in the circumstances described above), then the person needs to use a particular type of attorney document. That document is called an *Enduring Power of Attorney (Medical Treatment)*. We can prepare this for you.

You can use an *Enduring Power of Attorney (Medical Treatment)* to appoint someone to make medical treatment decisions on your behalf. That person is called an "agent".

The decisions the agent can make include the right to refuse treatment for the person — including to overrule the practitioner's decisions as described above. However, the Victorian Civil and Administrative Tribunal can still overrule the agent's decision.

Does the "agent's" decision overrule the personal attorney's decision on a medical or dental matter?

Yes, if the person appointing the personal attorney also appoints an "agent" under an *Enduring Power of Attorney (Medical Treatment)*, then:

- the "agent's" decision about any proposed medical or dental treatment will overrule any decision the personal attorney makes about the same treatment; and

- the "agent" will be able to refuse to consent to medical treatment on the person's behalf in all circumstances regardless of whether the personal attorney consents, or wishes to consent to that treatment.

When must the personal attorney stop making decisions under the *Enduring Power of Attorney*?

The person giving the power, and their personal attorney, need to remember that the personal attorney's ability to make decisions under the *Enduring Power of Attorney* can come to an end for a number of reasons including:

- the person giving the power appointing someone else as their personal attorney;
- the personal attorney renouncing their powers;
- the personal attorney becoming bankrupt;
- the personal attorney becoming incapacitated or dying;
- the personal attorney's authority being removed by a Court or Tribunal.

Therefore it's a good idea to appoint an alternate personal attorney or more than one personal attorney to act jointly with another.

Signing powers of attorney

Signing powers of attorney correctly so that they are valid is quite complicated.

There is a detailed set of instructions of what you need to do contained at the end of this guide.

Instruction sheet to prepare your Powers of Attorney

What is your full name: ……

Date of birth: ……

Current address: ……

……

Who do you want to appoint to be your personal attorney(s)? Full name and address:

……

……

……

Are they to act jointly, severally or one as the alternate to the other?

……

……

Who do you want to appoint to be your financial power(s) of attorney?

……

……..

……..

If more than one, are they to act jointly, severally or one as the alternate to the other?

…… ……

……

Executing and signing your power of attorney

You need to arrange for the document to be signed and witnessed.

Who needs to sign and witness the *Enduring Power of Attorney*?

You need to arrange for the *Enduring Power of Attorney* to be:

- signed and dated by the person giving the power;
- signed and dated by the persons they are appointing as their attorneys; and
- signed and dated by the person(s) they are appointing as their alternative attorney.

The document needs to be signed in the presence of witnesses as set out below.

Each witness signs the power of attorney to state that:

- the relevant person has signed the power of attorney document freely and voluntarily in the presence of the witnesses; and
- at the time the relevant person has signed the document, they appeared to have the capacity to understand the effect of the power of attorney.

Each witness needs to be satisfied of both of those points before they sign the document.

How many copies should be signed and witnessed?

You only need to sign one *Power of Attorney* document. You can make as many copies of the original document as you like.

You should arrange for the original to be kept in a safe and secure place. **We recommend that the appointed attorney stores the original document not the person appointing them.**

What are the requirements for witnessing the signing of the *Power of Attorney*?

The signing of the power of attorney must be witnessed by two adults.

At least one of the witnesses must be unrelated to:

- the person who gives the power;
- the attorney(s); and
- any alternative attorney.

Also, at least one of the witnesses must be a person authorised by law to witness the signing of a statutory declaration. The following people are the main categories of people authorised to do that:

- ♣ a justice of the peace or a bail justice;
- ♣ a public notary;
- ♣ an Australian lawyer (within the meaning of the *Legal Profession Uniform Law*;
- ♣ the registrar or deputy registrar of the Magistrates' Court;
- ♣ a member of the police force;
- ♣ the sheriff or a deputy sheriff;
- ♣ a member or former member of either House of the Parliament of Victoria;
- ♣ a member or former member of either House of the Parliament of the Commonwealth;
- ♣ a councillor of a municipality;
- ♣ a senior officer of a Council as defined in the *Local Government Act* 1989;
- ♣ a person registered under the Health Practitioner Regulation National Law to practise in the medical profession (other than as a student);
- ♣ A person registered under the Health Practitioner Regulation National Law:
  - (i) to practise in the dental profession as a dentist (other than as a student); and
- ♣ a veterinary practitioner;
- ♣ a person registered under the Health Practitioner Regulation National Law to practise in the pharmacy profession (other than a student);

- ♣ a principal in the teaching service;
- ♣ a member of the Institute of Chartered Accountants in Australia or the Australian Society of Accountants or the National Institute of Accountants;
- ♣ a minister of religion authorised to celebrate marriages (but not a civil celebrant);

Who cannot be a witness?

A witness cannot be:

- ♣ the person who gives the power;
- ♣ the attorney; or
- ♣ the alternative attorney.

When must the witnesses be present?

Both of the witnesses must be present:

- when the person giving the power signs the document;
- when the attorney signs the document;
- when the alternative attorney signs the document; and
- when each witness signs the document.

Does the power of attorney need to be registered anywhere?

No, in Victoria, there is no requirement for a power of attorney to be registered.

Where should the documents be stored?

The original document should be stored in a safe and secure place. We recommend that the document be held in the custody of the main Attorney, and a copy be held by the appointor.

You should tell the alternate attorneys and close family members where the original document is stored. Those people may need to be able to find the document at a time when the person appointing the attorney is incapacitated and unable to help find the document.