

respect my decisions: IT'S MY RIGHT!



A Guide to Advance End-of-Life Care Planning
For Gay, Lesbian, Bisexual, Transgender & Intersex People

Introduction

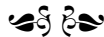
This booklet was developed as a resource to assist gay, lesbian, bisexual, transgender and intersex (GLBTI¹) people understand the legal rights and options that they and their partners/close friends have in relation to end of life care and treatment. We hope it will also assist GLBTI people to plan for and document their wishes for health care and treatment, and financial matters, at the end of life.

¹ There are many different terms people choose to utilise to describe their identity and we respect each individual's right to do so. For the purpose of this document we use the acronym GLBTI but we acknowledge that GLBTI people are not an homogenous group and that this terminology has its limitations.

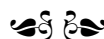
This booklet was developed by researchers from the ASLaRC Aged Services Unit of Southern Cross University, with advice from an Advisory Committee of representatives from ACON, the Gender Centre, the Inner City Legal Centre, the Northern Rivers Community Legal Centre and the University Centre for Rural Health, North Coast. It is part of a larger project, led by Professor Colleen Cartwright, Director of ASLaRC, which includes two reports² on end-of-life care for GLBTI people. It was published in 2011.

² The reports are available from <http://aslarc.scu.edu.au/downloads.html>

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This booklet is dedicated to the memory of Dr Tania Lienert, one of the principal researchers in the End-of-Life Care for Gay, Lesbian, Bisexual, Transgender and Intersex People project, and later a valued member of the Steering Committee, who died on 7 December 2010 following a tragic accident.



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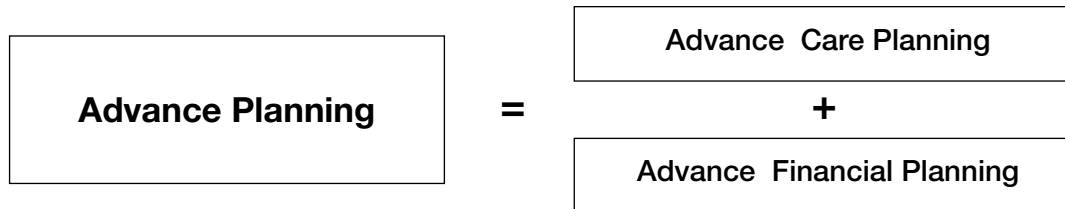
Disclaimer: any opinions expressed in this publication are those of the authors and do not necessarily reflect the views of the Law and Justice Foundation's Board of Governors.

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Overview of Advance Planning

This booklet has been developed to address the specific needs of the gay, lesbian, bisexual, transgender and intersex (GLBTI) community in relation to planning in advance for the end stage of life. It explains how you can make your wishes known about your future healthcare, lifestyle, finances and property, in case the time comes when you cannot speak for yourself, and what your options and rights are.



The information has been separated into four sections which provide information on the following: Section 1 covers Advance Care Planning for healthcare and medical decisions. Section 2 covers Advance Planning for financial and property-related decisions. Section 3 provides information relating to Capacity and Section 4 discusses Advance Planning for Funerals and Burials. Inside you will find overviews that explain the differences between the options.

We hope that you find this a valuable resource.

Why is Advance Planning Important?

Advance Planning can formalise your wishes concerning the healthcare you would like to receive, your choices about your finances and assets and your wishes relating to your funeral or burial.

You can formally document these wishes and also appoint someone (or more than one person) to make decisions for you in line with these wishes, in case you cannot make such decisions yourself.

"I've seen people, when things haven't been put in place, the chaos that arises... If you have the paperwork done, it alleviates the chaos, and makes the roles really clear."

Advance Planning is important for everybody, not just people who are ageing or ill. Advance Planning tools can come into effect at other points in your life, such as during serious injury or temporary incapacity. They are an important way of expressing and protecting your beliefs, needs and wishes.

DO IT NOW! Don't wait until you are old or sick – that may be too late.

Taking the time now to appoint an Enduring Power of Attorney to make financial and property-related decisions, an Enduring Guardian to make health and lifestyle decisions or to make an Advance Health Care Directive outlining your wishes concerning your healthcare are the best things you can do to ensure that significant people in your life can legally take care of you and make decisions for you, should you not be able to.

Advance Planning can be a way of maintaining your independence or boundaries around your lifestyle, where you can affirm and protect your personal choices. Advance Planning can also help to ensure that your wishes will be respected. It provides a way to advocate for yourself for the future.

SECTION 1: Advance Care Planning

Overview

This section covers the processes that you can use now to record your medical, healthcare and other personal decisions, in case at some future time you are unable to make your wishes known.

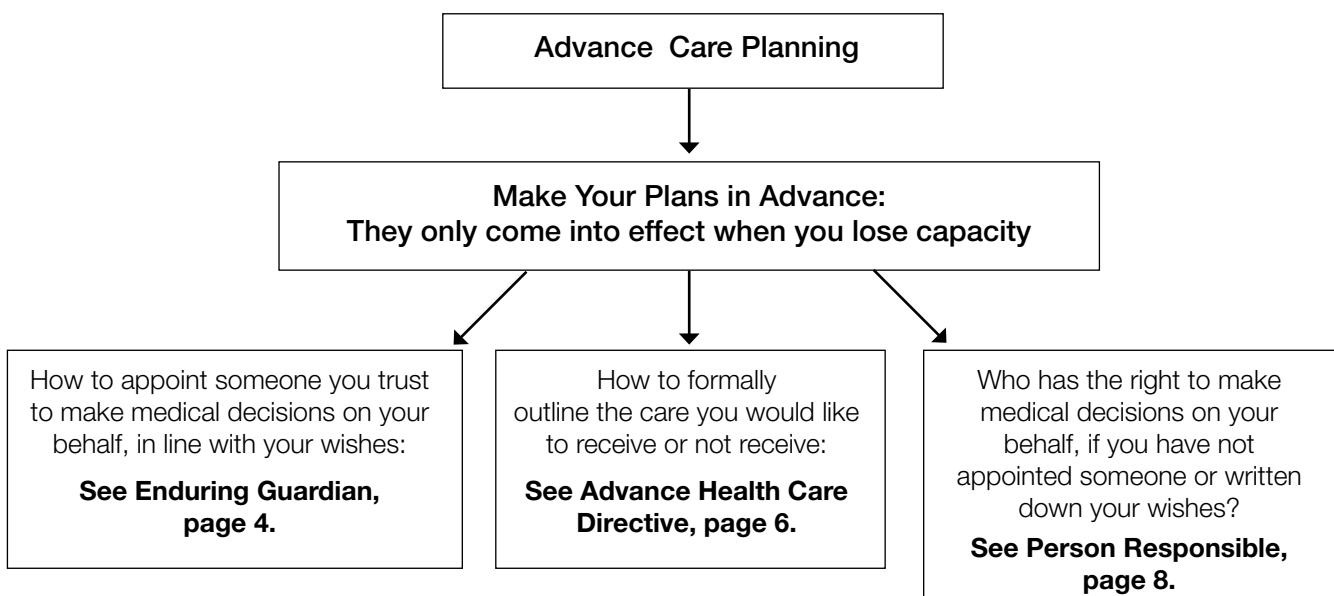
Advance Care Planning can take the pressure off same-sex couples who, during a time of crisis, may be asked to prove their relationship and right to make decisions for a partner or friend. Advance Care Planning formalities do not require that the type of relationship is specified, only that a particular person or people are given the authority to make decisions on your behalf, should you not be able to.

Advance Care Planning:

- * Helps you protect your wishes, lifestyle and choices
- * Puts you in control of what happens in your life
- * Makes your wishes known, including in your own words
- * Assists healthcare providers and those around you with decision-making should you not be able to make a decision or express your decision yourself
- * Relieves stress in a time of trauma
- * Gives security about the future
- * Can give confidence to those around you that they are choosing what you would want
- * Prevents those people you do not want involved in your affairs from having a say

Some situations require legal authority for a person to act on your behalf. Informal arrangements may become inadequate or you may lose the capacity to tell people around you what you want. That is why it is important to have these legal mechanisms in place. Available legal mechanisms include:

- an Enduring Guardian (see Part A)
- writing an Advance Health Care Directive (see Part B)
- Understanding the role of the Person Responsible (see Part C)



PART A: ENDURING GUARDIAN

What Does an 'Enduring Guardian' Mean?

An Enduring Guardian is a person you appoint to make personal, lifestyle and/or health-related decisions on your behalf, should you not have the capacity to make or communicate those decisions. The Enduring Guardian is the first person to be contacted on the list of those who can act as Person Responsible, and so is the best way to ensure that the person you choose has the legal authority to make these decisions for you. You can have more than one Enduring Guardian, giving each person authority in different areas of your life.

Who Can Be an Enduring Guardian?

An Enduring Guardian is usually a trusted relative, friend or partner. They must be over 18 years of age and cannot be someone who professionally provides medical treatment, care, accommodation or living support services to you, or be a relative of someone who does.

When Does it Come into Effect?

The authority of an Enduring Guardian only comes into effect when you lose the capacity to make or communicate decisions concerning your healthcare, personal interests, lifestyle or living arrangements (See Section 3: Capacity).

When Does it End?

An Enduring Guardianship ends, or loses legal authority, when it is revoked, or if you regain the capacity to make these decisions for yourself, or upon your death.

Why is Appointing an Enduring Guardian Important?

Appointing an Enduring Guardian ensures that, should you not be able to make or express your own decisions, someone who knows you and that you trust will be the person making those decisions instead. The more you can discuss your wishes and preferences with this person beforehand or document them in an Advance Health Care Directive, the more likely their decisions will be in line with your wishes. Don't wait until you are old or sick – DO IT NOW!

Under the NSW Guardianship Act there is a list of people who can make decisions for you if you cannot make your own decisions. This is called the hierarchy of Person Responsible and an Enduring Guardian is the first person in that list. That is, they will have the authority to consent to or refuse proposed medical treatment before any other person.

How is an Enduring Power of Attorney Different to an Enduring Guardian?

Under an Enduring Power of Attorney, the person you appoint can make finance and property-related decisions on your behalf. An Enduring Guardian can make decisions on your behalf concerning your health and medical treatment, lifestyle or personal matters, depending on what you appoint them to do.

Consequences and Implications:

Having an Enduring Guardian means that the person you want to make healthcare, lifestyle and personal choices for you is the one given the legal authority and protection to do so. By making your wishes known in this way, it also means that those whom you may not want to be involved in those decisions have no legal authority.

By appointing an Enduring Guardian and making them aware of your beliefs and wishes you have the best chance that the person who most understands these beliefs and wishes is the one making the decisions on your behalf.

Examples:

When Sarah rushed to be at her partner Maggie's side after a serious accident, the doctor in charge asked her to prove that she was in a relationship with Maggie. If she had been appointed as Maggie's Enduring Guardian, she would have been able to make Maggie's health care decisions without the need to do that.

Before becoming ill, Angus had had long-standing intimate relationships with two partners at the same time. Although they were extremely close relationships, neither were the live-in, stable kind. Angus did not trust anyone else with the major decisions in his life but he needed a plan to assist both partners to work together when making decisions for him.

John is living with a terminal illness. He comes from a very religious background and his family have not accepted his homosexuality nor his partner of 15 years, Kent. As his illness has progressed, his relatives have increasingly pushed their way into his and Kent's life. It has been hard to stop them as John and Kent have needed their help and also because they recognise that John's family are trying to express their love for him and make their peace. However, John's family have increasingly shut Kent out of the decision-making processes, often making decisions contrary to John's own wishes.

How to Appoint an Enduring Guardian:

A form to appoint an Enduring Guardian can be obtained from the ASLaRC website, the Office of the Public Guardian or the Attorney General's Department of NSW (see links below). The Principal (ie you, the person appointing the Enduring Guardian) must be over 18 and have the capacity to understand the appointment at the time the appointment is made.

The form must be signed by you and your Enduring Guardian or Guardians and all signatures must be witnessed by a solicitor, barrister or Registrar of the Courts. It is not necessary for all the signatures to be witnessed at the same time. If more than one Enduring Guardian is appointed, you need to state how they will make their decisions (whether together or separately).

What if I Change My Mind?

A form to revoke the appointment of an Enduring Guardian is also available from the Office of the Public Guardian. This form needs to be signed and witnessed as above and the Enduring Guardian(s) notified of the revocation in writing.

What Happens if I Don't Appoint an Enduring Guardian?

If you do not appoint your own Enduring Guardian, then the law provides that someone called the 'Person Responsible' can make healthcare decisions for you (See Part C: Person Responsible, page 8).

Where Can I Get More Information or Support?

ASLaRC

Website: <http://aslarc.scu.edu.au/downloads.html>

The Private Guardian Support Unit (PGSU)

Ph: (02) 9265 1441 or Tollfree: 1800 451 510

The Office of the Public Guardian

Ph: (02) 9265 1443 or Tollfree: 1800 451 510

Website: www.lawlink.nsw.gov.au/opg

The Guardianship Tribunal

Ph: (02) 9555 8500 or Tollfree: 1800 463 928

TTY: (02) 9552 8534

Website: www.gt.nsw.gov.au

PART B: ADVANCE HEALTH CARE DIRECTIVE

What is an 'Advance Health Care Directive'?

An Advance Health Care Directive is a legally-binding document in which you can record your personal values about what is important in your life and express your wishes, preferences, choices and/ or beliefs about your future medical treatment, including what procedures and treatments you do or do not wish to receive. Examples of these may include a 'Do Not Resuscitate' (DNR) order, other life-support interventions or surgical procedures. The Directive is written when you are competent and able to express your wishes clearly in case there comes a time when you are not able to do so. It is a way of extending your current right to consent to or refuse treatment to a future time when you cannot do so.

When Does it Come into Effect?

An Advance Health Care Directive only comes into effect when you lose decision-making capacity or the ability to express your decisions.

When Does it End?

An Advance Health Care Directive ends, or loses legal authority, only upon your death (unless you have previously revoked it).

Why is Preparing an Advance Health Care Directive Important?

An Advance Health Care Directive gives healthcare professionals, such as doctors and nurses, and loved ones a clearer or exact understanding of the types of care you do or do not want to receive. As such, it gives you a say in, and control over, your own healthcare even though you have lost capacity.

Advance Health Care Directives also lessen the burden that making difficult medical decisions imposes on loved ones and health professionals. As these decisions usually have to be made during a time of great stress and trauma, having your wishes and beliefs stated clearly and exactly can be a great relief.

How is an Advance Health Care Directive Different to an Enduring Guardian?

An Advance Health Care Directive is a written document which states what treatment you do or do not wish to receive. An Enduring Guardian is the person you appoint to make healthcare, personal and lifestyle decisions for you. As an Advance Health Care Directive is written by you, it has authority over the decisions made by an Enduring Guardian. An Enduring Guardian can make healthcare decisions for you where the Directive has not specified your exact wishes.

Consequences and Implications:

An Advance Health Care Directive is legally-binding if it is freely made by a competent person who understood the nature and effect of what they were writing, except where the Directive asks for an illegal treatment, such as euthanasia, or futile treatment.

It is recommended that you update your Directive every few years or if there is a change in your health status.

Examples:

Lorraine always said she wouldn't want to be resuscitated if her heart stopped, but they wouldn't listen. I wish she'd written it all out so they would stop and take note. I could have proved to them that it was what she wanted.

As Michael aged he had no one he could really trust to make the sort of decisions on his behalf that he would make himself. His Advance Health Care Directive not only outlined what treatments he did and didn't want, but stated who he was and what he believed in. Because he wasn't sure who would be there at the end he wanted to make sure the doctors and nurses understood.

How to Prepare an Advance Health Care Directive:

A GLBTI-specific Advance Health Care Directive is available from the websites below.

To complete an Advance Health Care Directive you must be over 18 years of age and have the capacity to understand the nature and effect of the decisions you are making in the Directive. It can be filled in at any time.

It is strongly recommended that you discuss this form with your doctor or medical specialist before completing it and ask them to sign it. Ideally, a well-designed Advance Health Care Directive has a place for your GP or medical practitioner to sign that you were competent at the time you completed it.

It is also strongly recommended that you have the form independently witnessed - such as by a Justice of the Peace, the Registrar at your local court or by a solicitor.

It is important to keep your Advance Health Care Directive accessible in case of an emergency or if you go to hospital. It is also a good idea to keep a copy with a friend or family member, your Person Responsible (such as your Enduring Guardian or partner) and your GP or medical specialist.

What if I Change My Mind?

An Advance Health Care Directive is not final - you can change it as long as you have the capacity to do so. You can make minor changes by signing and dating alongside the change, or major changes by destroying the current Directive and making a new one. You then need to give a copy of the new Directive to anyone who had a copy of the previous one.

You can also revoke your Directive at any time. This should be done in writing, witnessed, and then sent out to anyone who previously held a copy.

It is strongly recommended that your Advance Health Care Directive is updated every two years and/or whenever there is a major change in your health status.

What Happens if I Don't Prepare an Advance Health Care Directive?

If you don't prepare an Advance Health Care Directive, but have appointed an Enduring Guardian, then the Enduring Guardian will be responsible for making decisions on your behalf (see Part A, page 4). If you have not appointed an Enduring Guardian, then such decisions will fall to the Person Responsible (see Part C, page 8). However, you will make their job easier if you give them written directions about your wishes.

Where Can I Get More Information?

GLBTI-specific resources are available from:

ASLaRC

Website: <http://aslarc.scu.edu.au/downloads.html>

ACON

Website: www.acon.org.au (Take 5)

The Gender Centre

Website: www.gendercentre.org.au

Other non-GLBTI-specific resources are available from:

Disability, Health and Aged Care

Website: www.dadhc.nsw.gov.au

The Benevolent Society

Website: www.bensoc.org.au

Advance Care Directive Association Inc.

Website: www.advancecaredirectives.org.au

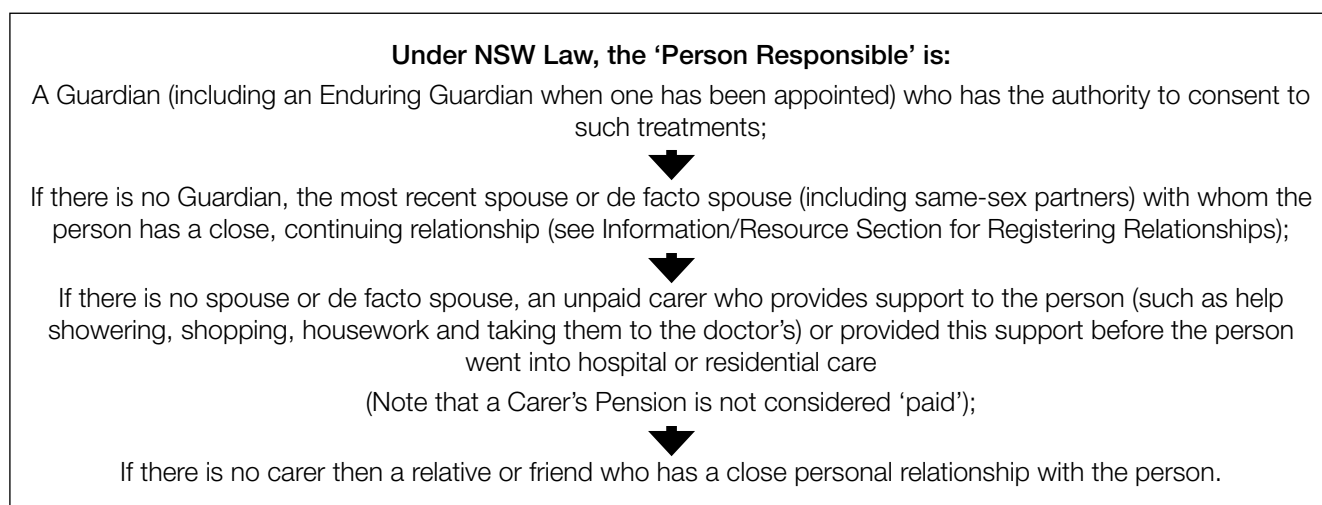
PART C: PERSON RESPONSIBLE

What Does 'Person Responsible' Mean?

If a person is seriously ill or injured and cannot give consent to (or refuse) medical or dental treatment themselves, the 'Person Responsible' is the person who has the legal authority to give consent to or refuse treatment on that person's behalf.

Who Can Be the Person Responsible?

There is a hierarchy of people that a medical practitioner or healthcare worker must work through in order to obtain consent on behalf of the patient. This means that people who share the type of relationships listed at the top of the list (such as same-sex partners) have precedence or authority over those listed further down.



The Person Responsible has a right and responsibility when acting on your behalf to understand the proposed treatment, including its risks, consequences and alternatives. They can also request a second opinion and for most matters they have the right to consent to or refuse treatment or procedures on your behalf.

As far as possible, your Person Responsible should make the decisions they think you would make if you had the capacity to do so, even if this is not the decision they would prefer to make.

When Does it Come into Effect?

As is the case with Enduring Guardian and Advance Health Care Directive, the authority of the Person Responsible only begins when you have lost capacity. In that case medical practitioners and other healthcare workers need to obtain consent from the Person Responsible to give any invasive treatment or healthcare. The only exception is where the proposed treatment is urgent or life-saving, in which case the practitioner does not require consent.

The Person Responsible cannot consent to some special medical treatments, such as experimental treatments, sterilisations or termination of pregnancy, nor if the patient has objected to the treatment. In addition, the law in NSW is still unclear about whether a Person Responsible - other than an appointed Guardian - can consent to the withdrawing or withholding of life-sustaining medical treatment.

When Does it End?

The authority of your Person Responsible to make decisions for you ends at your death, or if the Guardianship Tribunal appoints someone else to make your healthcare decisions.

If your Person Responsible is unable or unwilling to make these decisions on your behalf, the next person in the hierarchy becomes your Person Responsible. If there is no-one to be your Person Responsible, the treating medical practitioner should seek consent from the Guardianship Tribunal.

Why is 'Person Responsible' Important?

Having a Person Responsible helps to ensure that your needs and wishes are honoured and your rights are protected, if you are unable to understand the implications of a proposed treatment, make a decision or express your wishes.

How is the Person Responsible Different to the Enduring Guardian?

An Enduring Guardian is someone who has been previously appointed by you to make medical, dental and/or healthcare decisions on your behalf. They are usually someone you trust and who is aware of your beliefs and wishes concerning your treatment. The Person Responsible is just the first person on the hierarchy list and may not know what you would/would not want. An Enduring Guardian has authority over any other Person Responsible.

Consequences and Implications:

The law relating to consent concerning medical and healthcare treatments is widely misunderstood. Many people still believe that the Next of Kin has authority to give or refuse consent when a patient cannot. That is not correct. However, the hierarchy of Person Responsible is designed so that those who are most likely to know the patient's beliefs and wishes the best are given the most authority to make decisions on their behalf (see box on previous page)

Example:

Georgina is a critically injured, 37-year-old woman on life-support after a serious car accident. Rachel, her female partner of 2 years is by her side when Georgina's mother Sally arrives, closely followed by Georgina's estranged ex-husband Henry, and a close friend, Jane, who has Enduring Power of Attorney.

Sally expects to make all of the decisions about Georgina's care as Next of Kin. Henry believes that he is the one to make the decisions as they were never officially divorced. Jane believes that, as she has Enduring Power of Attorney she has the legal right to make these decisions.

However, as Georgina's partner, it is Rachel who is the highest in the hierarchy of Person Responsible because her relationship with Georgina is (the most current), close and lasting relationship. Being legally married does not give greater authority in these matters. Jane does not have authority as the Enduring Power of Attorney does not relate to medical or healthcare decisions, only financial and property-related ones. Being Next of Kin does not automatically give authority either.

Where Can I Get More Information?

ASLaRC

Website: <http://aslarc.scu.edu.au/downloads.html>

The Office of the Public Guardian

Website: www.lawlink.nsw.gov.au/opg

The Guardianship Tribunal

Website: www.gt.nsw.gov.au

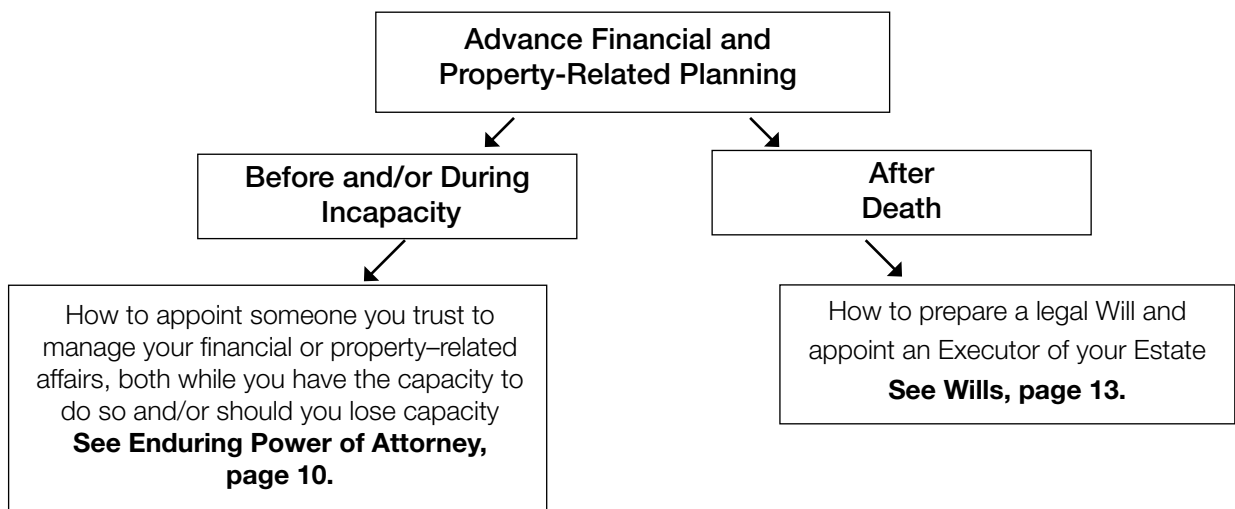
SECTION 2: Advance Financial Planning

Overview

This section relates to financial and property-related decisions.

Part A concerns appointing an Enduring Power of Attorney, someone you appoint ahead of time to make financial and property-related decisions for you, in line with your personal beliefs and wishes. The Enduring Power of Attorney may act on your behalf at any time you specify and their authority continues when you do not have the capacity to make these decisions yourself.

Part B discusses the importance of Wills as a measure of providing for your partner and other loved ones according to your own wishes.



PART A: ENDURING POWER OF ATTORNEY

What is an 'Enduring Power of Attorney'?

An Enduring Power of Attorney is a legal document that allows you to appoint someone ('the Attorney') to make financial, legal and property-related decisions for you (the 'Principal') both in the present but also in case there comes a time when you cannot make or express these decisions for yourself.

An Enduring Power of Attorney can be general - where your attorney can make any financial and legal decisions you would be able to - or specific, such as the authority to operate bank accounts or pay bills. To sell or manage real estate on your behalf, your Enduring Power of Attorney must be registered with the NSW Department of Lands and it should also be registered if you want your Attorney to buy or sell shares.

Example:

Steve and Pete had been workmates and friends long before they started a relationship. As the relationship was relatively new, Steve wanted to make sure that Pete had the legal authority to not only look after him if he needed it, but look after his kids as well, who had known Pete since they were born. He wanted Pete to have access to bank accounts or anything else he might need to do that.

You can also have more than one attorney and specify how each will act on your behalf.

When Does it Come into Effect?

You can choose when you would like your Enduring Power of Attorney to start. It could be immediately or at a future date, such as in the event that you lose capacity. If not specified otherwise, it will start at the time the appointment is made.

When Does it End?

An Enduring Power of Attorney ends: if you revoke (withdraw) it; if the attorney stands down or becomes bankrupt; or upon your death. It also ends if a single attorney or one joint attorney can no longer fulfil this role or dies. If this was to happen when you did not have the capacity to make alternative arrangements, the Guardianship Tribunal could make alternative provisions.

Why is Appointing an Enduring Power of Attorney Important?

Appointing an Enduring Power of Attorney means that the person whom you would like to handle your legal and financial affairs is the one who has the legal authority to do so. Appointing someone ahead of time can mean that you will have assistance available when you need it most. For example, it can ensure that a same-sex partner has the legal authority to access bank accounts, pay bills, take care of dependents, pay for your accommodation or deal with any unforeseen events should you not be able to for any reason.

An Enduring Power of Attorney can also provide concrete evidence of a trusting, close relationship between you and your partner, which can be particularly important for partners who do not live together, have children together or have not been in their relationship for two or more years. Appointing your partner as your 'attorney' can help protect them from having to 'prove' their interest in your affairs.

How is an Enduring Power of Attorney Different to an Ordinary Power of Attorney?

The Prescribed Power of Attorney form is used to appoint both an ordinary Power of Attorney and an Enduring Power of Attorney. They both work in exactly the same way, except that the authority of a Power of Attorney becomes null and void if you lose the capacity to make your own decisions. An Enduring Power of Attorney continues in the event of your incapacity.

Example:

For years after Brenda transitioned, some medical staff at her local hospital still used her previous, male name and referred to her as 'he' or 'him'. She became increasingly reluctant to get treatment despite her illness. We suggested she appoint her partner John as her Enduring Guardian and as her attorney under an Enduring Power of Attorney so that she felt she had someone to stand up for her and make her hospital stays as easy as possible. If it got too much for John, he was under strict instructions to sell specific assets and employ a home-nurse she knew so that she could be cared for at home.

Consequences and Implications:

It is important that you appoint someone trustworthy and reliable who has your best wishes at heart, as during incapacity you will not have the ability to direct or oversee them. You should specify what powers your attorney is to have and how you would like your affairs to be handled in as much detail as possible. Your Attorney is legally bound to follow your directions specified in the document. They need to act in your best interests, keep their property and money separate from yours and maintain proper records of everything they do on your behalf. Because of the responsibility and work involved you may choose more than one person and specify how they would perform their duties, either together or separately.

Appointing an Enduring Power of Attorney does not prevent you from handling your own financial and legal affairs while you have capacity. However it is a safeguard in case there comes a time when you do not have the ability to make these decisions or manage these affairs. Appointing an Enduring Power of Attorney will also not affect your Will in any way, as the authority ceases to the moment of your death, when your Will comes into effect.

Example:

As Elena became more ill, she became unable to do the smallest things like shopping, so she would just get out hundreds of dollars once a month so friends could do it for her. It got dangerous. Then other jobs like remembering to pay bills became too much... Eventually she decided to 'activate' her Enduring Power of Attorney. Her attorney was a good friend who helped her sell her car and house so that she could buy a small unit in a care facility where she could be looked after. She knew that as time went on, she would be in good hands.

How to Appoint an Enduring Power of Attorney:

To appoint an Enduring Power of Attorney you must be over 18 and have the capacity to understand the nature and consequences of that appointment (see Section 3: Capacity). Forms are available from ASLaRC or the Guardianship Tribunal (see below). It is recommended that you seek legal advice from a solicitor or community legal centre to make sure that you understand the document and that it suits your individual needs.

You must complete and sign the form and have your signature witnessed by a prescribed witness – a solicitor or barrister, Registrar of the Local Court, licensed conveyancer or an employee of the Public Trustee or private trustee company who has completed the approved training. The Registrar does not charge for this service. The prescribed witness will explain the form to you and sign a witness' certificate after they have assessed that you had the capacity to understand what you were signing at the time you signed it.

Your proposed attorney must also consent to the appointment and sign to that effect, otherwise the appointment is not valid. If you do not know anybody suitable to act as your attorney, you can engage the Public Trustee to act as attorney on your behalf. There will be a fee for this service.

What if I Change My Mind?

You can revoke your Enduring Power of Attorney at any time as long as you have the capacity to do so. You need to inform your attorney, any other relevant business or institution, and the NSW Department of Lands if relevant, preferably in writing, and then destroy the document and any copies. You are liable for your attorney's actions until they are informed of the revocation.

What Happens if I Don't Appoint an Enduring Power of Attorney?

If you do not appoint an Enduring Power of Attorney your biological family may be able to take legal action to challenge your partner's right to make financial, legal and property-related decisions. An Enduring Power of Attorney is the best way to ensure that your partner or other person of your choosing is able to make these decisions on your behalf.

If you do not have someone with legal authority to manage your affairs and you lose capacity, someone, such as a family member, friend or a healthcare worker may apply to the Guardianship Tribunal or the Supreme Court to have a financial manager appointed for you. The financial manager is a substitute decision-maker who will only be appointed if informal decision-making is inadequate. However, such appointments take time and may mean a long delay. It is better to appoint someone yourself.

Where Can I Get More Information?

Someone acting under an Enduring Power of Attorney may apply to the Guardianship Tribunal or the Supreme Court for advice for any function they need to carry out in this role. Other Information is available from:

ASLaRC

Website: aslarc.scu.edu.au/downloads.html

The Public Trustee

Ph: 1300 364 103

Website: www.pt.nsw.gov.au

The Inner City Legal Centre

Ph: (02) 9332 1966

Website: www.iclc.org.au

The Guardianship Tribunal

Tollfree: 1800 463 928

Website: www.gt.nsw.gov.au

The Gender Centre

Ph: (02) 9569 2366

Tollfree: 1800 069 115

Website: www.gendercentre.org.au

Ageing, Disability and Home Care (AHDC) NSW Department of Communities

Website: www.dadhc.nsw.gov.au

Northern Rivers Community Legal Centre

Ph: (02) 6621 1000

Website: www.nrclc.org.au

Land and Property Information Division, NSW Department of Lands

Ph: (02) 9228 6666

Website: www.lands.nsw.gov.au

The Supreme Court

Website: www.lawlink.nsw.gov.au

PART B: WILLS

What is a Will?

A Will is a legal document outlining who you would like to receive your assets - such as money, property and household goods - after you die.

Why is a Will Important?

A valid Will is the only way you can be sure that your property and assets, including personal belongings, are given to those who you want to receive them, and, where no specific responsibility exists, not to those you don't.

In terms of providing for your partner, this is particularly important where:

- family members or people around you don't accept your relationship; or
- if you have lived with your partner for fewer than two years or do not live together; and
- you have not had a child with your partner.

In these cases, your partner may have to go through the expense and additional distress of proving that they were in a relationship with you. Even so, the process may not have the outcome you would like.

A Will also gives you the opportunity to appoint an Executor who will be in charge of your funeral and burial arrangements as well as overseeing the distribution of your assets. This gives you the opportunity to appoint someone you trust and to whom you can outline your wishes beforehand. Your wishes regarding funerals and burials are not legally binding, but by appointing someone you trust as your Executor, there is more likelihood that your wishes will be followed.

Who Can Make a Will?

To make a valid Will, you must be over 18 years old (unless married), have the capacity to understand the nature and effect of what you are doing and make the decisions of your own free will. In addition, the Will must be in writing and must be signed by yourself and two witnesses (neither of whom should be a beneficiary, spouse or partner). The witnesses must be (individually) present when you sign or acknowledge your Will and they too must sign in your presence. If a Will is not completed in this way it may not be enforceable.

What Does a Will Involve?

In your Will, you should appoint an Executor to carry out your wishes. This can be your partner, a relative, friend or your Solicitor. Ask them first then confirm their appointment with them.

An executor who is not a beneficiary can apply to the court for payment for their work as an Executor. If you do not know who to appoint, the Public Trustee can be the Executor for a fee.

How Do I Make a Will?

Will kits are available from most post offices and newsagents, although a handwritten Will can also be valid. It is strongly recommended that you have your Will checked by a solicitor to make sure that it is valid. There are special rules as to how it must be structured, worded, signed and witnessed. Homemade wills may also cause an unwanted tax liability.

Legal advice for Wills is often provided for free or at a discount, such as at community legal centres. Some courthouses also provide 'Will Days'.

Where Can I Get More Information?

The Law Society of NSW

Website: www.lawsociety.com.au

The Public Trustee NSW

Website: www.pt.nsw.gov.au

LawAccess NSW

Ph: 1300 888 529

TTY: 1300 889 529

TIS: 131 450

Website: www.lawaccess.nsw.gov.au

SECTION 3: Capacity

Why is Capacity Important?

Many of the Advance Planning options mentioned in this booklet come into effect when the person who has organised them has lost the capacity to make that or those particular decisions. In addition, for these documents to be valid, the person making them must have the capacity to understand the decisions they are making at the time they are making them.

What is Capacity?

Capacity is the ability to make your own decisions. More specifically, it is the ability to:

- understand the facts relating to a decision
- understand what choices are available
- understand the consequences of each of those options and the effect(s) they will have
- retain the information long enough to weigh up each option and make an independent decision
- communicate the decision to others

In other words, you must be able to understand both the nature and the effect of the decision to be made.

Who Determines Capacity?

Legally, an adult is presumed to have capacity unless it can be proven that they do not. The onus of proof is on the person making the claim of incapacity. However, a GP or Psychiatrist may need to confirm that a person does or does not have capacity.

What Incapacity is Not:

Incapacity, or the inability to make a particular decision, must not be confused with:

- ignorance
- eccentricity, cultural differences or having different ethical views
- a failure of communication
- bad decisions or decisions other people would not agree with
- disagreeing with the health care provider or financial advisor

What Happens if a Person Does Not Have Capacity?

If the person has not previously appointed someone to make the particular type of decision that is required (ie an Enduring Guardian or healthcare decisions or an Enduring Power of Attorney for financial matters) and there is no Person Responsible, the Guardianship Tribunal can appoint a substitute decision-maker or can make decisions on a person's behalf .

Where Can I Get More Information?

More information about Capacity, including Information Sheets and a Checklist, are available from **ASLaRC**:
Website: <http://aslarc.scu.edu.au/downloads.html>.

A booklet and an online resource can be obtained from **Lawlink (Diversity Services)**:

Ph: (02) 8688 8460 or (02) 8688 7507

Website: www.lawlink.nsw.gov.au/lawlink/diversityservices

The Guardianship Tribunal can help with information, giving consent and resolving disputes.

Ph: (02) 9555 8500 or Toll free: 1800 463 928 Website: www.gt.nsw.gov.au

SECTION 4: Funerals and Burials

Overview

This section covers issues around what happens to your body after you die and how you wish to be remembered. Some of these issues are particularly relevant to GLBTI people where their wishes and lifestyles, and those of their family of choice, may conflict with those of their family of origin.

Why is Planning a Funeral Important?

Example:

Brenda is a terminally ill transgender woman with three adult children. While her children have accepted her as a woman in life, one of them has expressed his wish to bury Brenda as his father.

Even though wishes concerning funerals and burials outlined in a Will or other document are not legally binding, it can be important to consider what may happen if you do not make your wishes known. A lack of planning can place an unnecessary burden on your loved ones at a distressing time and may also mean that you are not given the funeral or burial you would like or even expect. This may especially be the case for transgender or intergender individuals, where their personal identity in life has not always been accepted by those around them. This may also be the case for people who would like their true life story expressed in a funeral, rather than the version family members may wish to tell, or conversely, where people are afraid of being 'outed' publicly upon their death.

You may also wish to express your views about religious funerals or the type of burial or cremation you wish to receive.

Example:

I saw a few nasty incidents where families who had disowned kids stepped in. One gay had two funerals in one day.

Who Organises the Funeral?

The executor of a Will has the legal authority to make the funeral arrangements. They can choose to pass this responsibility on to a family member or friend. Where there is no Will, the funeral can be arranged by the Next of Kin, or other family and friends, as an administrator of the estate may not be appointed for some time. The person arranging the funeral is the only person who can make arrangements with the crematorium or cemetery, including signing all burial or cremation permits.

How Can I Ensure My Wishes Will Be Carried Out?

Example:

One guy who was diagnosed went downhill very quickly. His parents came the day before he died. They wanted to take his body back to the country town where he was from. They didn't want his partner or friends involved.

You can detail your wishes in your Will but ultimately it is up to the Executor what happens after you die. It is in your own best interests to discuss with them the funeral and burial that you would like to have, e.g. if you want to be buried or cremated and who you want to speak at your funeral.

You can make your own funeral arrangements with the funeral director of your choice or these can be outlined in a funeral fund or other pre-payment plan. Obviously, the more you make your own arrangements, the more likely it is that your wishes will be followed. Choosing a responsible and trustworthy Executor is also important.

Other Financial Issues

Centrelink has payments available to help people after someone has died, such as the Bereavement payment and Bereavement Allowance. For more information, go to www.centrelink.gov.au/internet/internet.nsf/individuals/help_index.htm

Some Superannuation funds do not recognise same-sex partners as 'dependents'. Binding Death Benefit Nomination forms can be completed for each fund to nominate beneficiaries. These are available from Superannuation funds and must be completed every three years to remain current. Whether or not a partner is considered a 'dependent' will also affect the tax applied to any lump sum death benefits.

Where Can I Get More Information?

The information packs below have tips on making your funeral cost-effective as well as step-by-step guides to lead you through planning a funeral. More information is also available from **Centrelink** at www.centrelink.gov.au.

A detailed guideline on what steps to take after the loss of a loved one is available free of charge from **LawConsumers** at Website: www.lawconsumers.org.

This also includes useful forms and checklists for preparing a funeral.

The Seniors Information Service has produced a Fact Sheet called 'Planning a Funeral', which is available for free at: Website: www.seniorsinfo.nsw.gov.au

More information is also available from **NSW Fair Trading**: Website: www.fairtrading.nsw.gov.au

SECTION 5: Dispute Resolution

What if My Enduring Guardian Does Not Act Appropriately?

Your Enduring Guardian appointment can be reviewed by the New South Wales Guardianship Tribunal if any person has a genuine concern for your welfare (contact information below). The Tribunal can suspend or revoke an Enduring Guardian appointment if they feel that it is in your best interests. They can also provide a substitute Guardian if they feel that it is necessary.

What if My Wishes Outlined on an Advance Health Care Directive are Not Honoured?

Advance Health Care Directives are legally-binding documents. If a treating doctor refuses to follow an Advance Health Care Directive, your Person Responsible or other friend/family member should immediately contact the Guardianship Tribunal and ask the tribunal to direct the doctor to follow your wishes. You can also contact the Health Care Complaints Commission (contact information below).

What if My Partner's Authority as Person Responsible is Not Acknowledged?

If your medical practitioner does not recognise your partner should advise the doctor that he or she has that authority under the law; if the doctor still does not recognise the authority, they should contact the Health Care Complaints Commission (contact information below).

What if I am Involved in a Dispute Over a Will?

In the case of a dispute over a Will or in any other legal matter in New South Wales, you can get information, legal advice and referrals from LawAccess New South Wales (contact information below).

What if My Enduring Power of Attorney Does Not Act Appropriately?

While you have capacity, an Enduring Power of Attorney ceases to operate when either you or your attorney want to end the agreement. If other people have concerns after you have lost capacity, The Guardianship Tribunal and the Supreme Court can review your Enduring Power of Attorney on the request of any 'interested person' who has a genuine concern for your welfare. The Tribunal can appoint a suitable replacement which maybe the New South Wales Public Trustee (see www.tag.nsw.gov.au). There is a charge for the services of the Public Trustee.

More information is available from:

The NSW Guardianship Tribunal

Ph: (02) 9555 8500 or Tollfree: 1800 463 928 TTY: (02) 9552 8534
Website: www.gt.nsw.gov.au
Email: gt@gt.nsw.gov.au

LawAccessNSW

Tollfree: 1300 888 529 TTY: 1300 889 529 TIS: 131 450
Website: www.lawaccess.nsw.gov.au

Health Care Complaints Commission

Ph: (02) 9219 7444 or Tollfree: 1800 043 159 TTY: (02) 9219 7555
Website: www.hccc.nsw.gov.au
Email: hccc@hccc.nsw.gov.au

Frequently Asked Questions

My son has my Enduring Power of Attorney. Can he make medical decisions for me?

No. An Enduring Power of Attorney only gives someone the authority to make financial decisions for you if you are unable to make those decisions. If you want to ensure that your son has the authority to make medical decisions for you, you would need to appoint him as your Enduring Guardian (see page 4).

How can I stop my family of origin getting involved in decisions about my care?

You can do this by writing an Advance Health Care Directive and appointing someone you trust to follow your wishes or beliefs as your Enduring Guardian. If you do not appoint an Enduring Guardian but you have a partner or someone who regularly provides you with unpaid care, that person would also have legal authority over a family member as your Person Responsible (see page 8).

Where should I keep my Advance Health Care Directive, Enduring Guardian and Enduring Power of Attorney forms?

Your Advance Health Care Directive, Enduring Guardian and Enduring Power of Attorney forms should be kept together in a safe, accessible place in case you lose capacity, go into residential care or go to hospital. You should give copies of your Advance Health Care Directive and Enduring Guardian forms, to your Enduring Guardian, your doctor and anyone else who may need to access them quickly in an emergency. You should give copies of your Enduring Power of Attorney form to your Enduring Power of Attorney or bank or other financial institution and to anyone else who may need to access it quickly in an emergency. Some people give copies to a neighbour. Others carry a card in their wallet with details of where the documents can be found. Make sure that you clearly provide the emergency contact details of your Enduring Guardian and next Person Responsible, just in case.

I have not 'come out' to my family or many of my friends, but I want my partner to have the authority to make decisions on my behalf. How can I do this?

You can appoint your partner as your Enduring Guardian for medical, lifestyle or healthcare decisions and give them Enduring Power of Attorney over your financial and property- related decisions. In this way, they don't have to be identified as your partner for the purposes of finding the Person Responsible.

Further Information, Resources and Contacts

End-of-Life Care for GLBTI People project researchers and Advisory Committee members' Organisations

ACON is a health promotion organisation with a central focus on HIV/AIDS. ACON provides HIV prevention and health promotion information, advocacy and care and support services.

Ph: (02) 9206 2000

Tollfree: 1800 063 060

TTY: (02) 9283 2088

Website: www.acon.org.au

ASLaRC: The ASLaRC Aged Services Unit, part of the Health and Well-Being Research Cluster of Southern Cross University. A major focus of ASLaRC's research is end-of-life care and advance care planning, with a commitment to social justice.

Website: <http://aslarc.scu.edu.au>

The Gender Centre is able to assist people through free counselling and community case management services in following up on any support needs. Contact details are:

Ph: (02) 9569 2366

Tollfree: 1800 069 115

Website: www.gendercentre.org.au

The Inner City Legal Centre (ICLC) is the specialist legal service for anyone who is gay, lesbian, bisexual, transgender or intersex in NSW. ICLC can be contacted at:

Ph: (02) 9332 1966

Email: iclc@org.au

Website: www.iclc.org.au

The Northern Rivers Community Legal Service offers free legal advice and help, advocacy, client support and community legal education. It advocates for social justice, particularly for people who are socially or economically disadvantaged.

Ph: (02) 6621 1000

Website: www.nrclc.org.au

University Centre for Rural Health (Previously Northern Rivers University Department of Rural Health) is a multidisciplinary centre of excellence in education of students for clinical practice in rural health and conducts research relevant to the health needs of rural communities.

Ph: (02) 6620 7570

Website: www.nrudrh.edu.au

Advance Care Directive Association Inc.

Ph: 0423 157 003
Website: www.advancecaredirectives.org.au

The Benevolent Society

Ph: (02) 9339 8000
Website: www.bensoc.org.au

Centrelink

TTY: 1800 810 586
Website: www.centrelink.gov.au

Health Care Complaints Commission

Ph: (02) 9219 7444
Tollfree: 1800 043 159
TTY: (02) 9219 7555
Website: www.hccc.nsw.gov.au

LawAccess NSW

Ph: 1300 888 529
TTY: 1300 889 529
TIS: 131 450
Website: www.lawaccess.nsw.gov.au

LawConsumers

Ph: (02) 9564 6933
Website: www.lawconsumers.org

The Law Society of NSW

Ph: (02) 9926 0333
Website: www.lawsociety.com.au

Lawlink (Diversity Services)

Ph: (02) 8688 8460
TTY: (02) 8688 7733
TIS: 131 450
Website: www.lawlink.nsw.gov.au

**NSW Department of Communities
Ageing, Disability and Home Care**

Ph: (02) 8270 2000
TTY: (02) 8270 2167
Website: www.dadhc.nsw.gov.au

**NSW Department of Lands
Land and Property Information Division**

Ph: (02) 9228 6666
Website: www.lands.nsw.gov.au

NSW Fair Trading

Ph: (02) 9895 0111
TTY: 1300 723 404
Website: www.fairtrading.nsw.gov.au

The NSW Guardianship Tribunal

Ph: (02) 9555 8500 or
Tollfree: 1800 463 928
TTY: (02) 9552 8534
Website: www.gt.nsw.gov.au

The NSW Relationship Register

Website: www.bdm.nsw.gov.au/Relationships

The Office of the Public Guardian

Ph: (02) 9265 1443
Tollfree: 1800 451 510
TTY: 1800 882 889
Information and Support: (02) 8688 6070

The Private Guardian Support Unit (PGSU)

Ph: (02) 8688 6060
Tollfree: 1800 451 510
TTY: 1800 882 889

The Public Trustee

Ph: (02) 9252 0523
Outside Sydney: 1300 364 103.
Website: www.pt.nsw.gov.au

The Seniors Information Service

Ph: 13 12 44
Website: www.seniorsinfo.nsw.gov.au

The Supreme Court

Ph: (02) 9230 8111
Website: www.lawlink.nsw.gov.au

