

EMPOWERING VULNERABLE DECISION MAKERS GUIDE SHEET

Is it time to activate your Power of Attorney or Guardianship?

Important Disclaimer

This document is an overview for general guidance only. It does not replace the need for advice on individual cases. For specific advice, your particular circumstances must be taken into account.

If you have established a Will, Power of Enduring Guardianship or Enduring Power of Attorney you are a vulnerable decision maker!

The moment you give someone the power to make decisions on your behalf, you are vulnerable to them abusing that power. In appointing a person as your executor, attorney or guardian you need to be certain that your representatives share your values and will act in your interests notwithstanding you may not be able to control them. In making these appointments, your will is only activated by death so once established, it can stay in the bottom draw. Regular review of the currency and appropriateness of its terms should occur. See our separate guide sheet about reviewing your estate administration documents. You can use the trigger lists as reminders of changes in your life that should trigger a review of your wealth conservation, estate administration and succession arrangements.

There are three phases to establishing the role of Attorney and Guardian in your affairs:

Phase 1: the creation of the appointment by the donor

The law in NSW is clear, once created, these documents can come into effect when accepted by the Attorney or Guardian in the future. If this is to be done, there need to be clear controls around how the acceptance is to occur if the risk of abuse of power is to be mitigated.

Just because a person consents to be an attorney or guardian at a point in time, does NOT guarantee they will be available or appropriate when the appointments need to be activated. People creating the appointments need to think about appointing alternates to their initial choices.

Using incapacity as a trigger for an appointment could create problems of evidencing the incapacity to 3rd parties and runs the risk that 3rd parties may not accept the evidence. Simple acceptance gives a cleaner result in our view that lowers the risk of 3rd parties NOT accepting the authority of the attorney, as long as the donor is certain the person appointed will only use the authority, they have for the strict purpose it was given. See phase 3 for how we approach supporting and de-risking your appointments.

Phase 2: the acceptance and activation of the appointment

When is the most appropriate time to bring the appointment into effect? For many families activating the appointment between spouses and deferring the activation by children is often sensible. Given the parents may then be incapacitated, this approach also raises the question of how do you guide your representatives in the administration of their power. This can be done by the creation of family conversations, councils, and advisory documents. Detailed controls can also be placed in the appointment documents themselves.

Working through these issues is part of our job to help people manage the governance and succession of their affairs.

Phase 3: establishing measures to help facilitate and defend the appointment

Is caution about representation now a source of mischief?

For many people, creating an Enduring Power of Attorney or a Power of Enduring Guardianship but leaving it unaccepted by some or all of their representatives seemed a wise strategy that allowed people to plan for the future but not create an active substitute decision maker until necessary.

Having regard to the current uncertainties in the world. It is certainly time to revisit the logic and purpose of those appointments!

Any initial concern someone may have had about their attorneys or guardians competing with their interests or being competent to undertake the role needs to be revisited before activation occurs.

We are now in the second decade of the 21st Century. Personal Representation Appointment (PRA) documents (e.g. Powers of Attorney and Guardianship) may have been created decades earlier. The relevance of the documents to current circumstances needs to be tested.

People who have created PRA documents (Donors) now have to consider before undertaking a PRA document review or activation:

1. Do they have the capacity and ability to make changes to their documents if necessary? Is it safe to assume current legal capacity given the presenting facts of the clients' situation? Is a capacity trigger present?
2. Do their representatives have the capacity and ability to undertake their role?
3. Do the representatives have a clear understanding of the fiduciary nature of their roles where they are appointed as Attorney?
4. Do the representatives have a clear understanding of the options of their role as supporting decision makers not just substitute decision makers?
5. Is it time to activate that representation?
6. How should that be done? How does the donor wish to assert their will and preference about their care to the Personal Representative they are appointing?
7. How then should activation be approached? Is a joint meeting between Donor and Representative warranted before activation proceeds?

Donors need to make sure that their expectations about how their affairs should be managed by their representatives are clearly set out if there is to be any hope of those expectations being able to be enforced in the future.

The consequence of silence on these matters is to allow Personal Representatives to substitute in many situations their opinion for the intent and expectation of the donor. Various forms of abuse can be the result of a self-interested application of that power. Donors need to be aware of and resolve any concerns they may have about the potential for Personal Representatives to abuse their power.

The Clinic supports the use of the National Decision Making Principles to guide the operation of attorneys and guardians. These principles in our view require the attorney or guardian to acknowledge that the donor, notwithstanding their appointment:

1. retains the right to make decisions,
2. retains the right to be supported in that decision-making, by in turn
3. the representative helps the person to exercise their will and preference, and
4. provide safeguards for exercising the donor's decision-making rights.

This approach we believe also requires the Personal Representatives, Carers, Supporters, Attending Professionals and Service Providers or Suppliers to have a clear understanding in dealing with a person:

1. Why they believe they can assume the legal capacity of a person,
2. Whether or not a capacity assessment trigger is present and
3. Whether a capacity assessment trigger is present and if so, what is the trigger and how resolution of the trigger should be approached.

Capacity is not age, diagnosis, situation or decision bound. It is a relative concept that must be fixed in its context for a person and in the course of that process, the capacity and capability of a person can be demonstrated, understood and evidenced.

Some Final Thoughts

The vulnerability of people creating these documents is to the job they are asking to be done NOT be carried out as they intend.

The ageing of society means the role of an attorney, guardian goes on for decades. Succession of the appointees is as material a part of estate planning as the succession of the donor.

Our role as lawyers is to facilitate the operation of the person or family fiscal enterprise in support of the client, their supports, family, and successors. Governance of a person's affairs starts with an understanding of their values. We are working with our colleagues at Ex Situ to use their tools in our estate administration and governance services.

For more information see <https://myexsitu.com>.

Getting Help to Respond to Cognition Issues

The Capacity and Capability Clinic at Autonomy First Lawyers can provide a structured medico-legal consultation co-seated by Dr. Jane Lonie, a clinical neuropsychologist and Michael Perkins TEP, independent of other contributing professionals already retained by the client, that can efficiently address the matter of a persons' capacity and capability in the course of completing assignments such as a PRA document review or activation. The Clinic is an outpatient-focused, privately funded service, support, educational and training platform that delivers a blended medico-legal, physical or video conference consultation-based service. Zoom and Microsoft Teams are currently hosted by the

Clinic. Please contact Autonomy First Lawyers to discuss the consultation hosting needed for a particular matter.

Referrals, appointments and clinician availability and general enquiries: Please email enquiry@autonomyfirstlawyers.com.au or phone 1300 31 42 82. Client appointments are conducted at Level 8, 65 York Street, Sydney unless otherwise arranged.

The Clinic's service through its supporter program provides access to specialist professionals and service providers with expertise relevant to the needs of ageing Australians, their issues and problems. Information about this support may also be provided to Clients of the clinic when appropriate to the assignment.

The Clinic is operated by Autonomy First Lawyers Pty Limited. The support of MQ Health and Macquarie University Hospital in helping start the clinic is acknowledged.