



Supporting someone who has an intellectual or cognitive impairment to have a will and/or enduring power of attorney prepared.

This resource is intended to be used to support a person with an intellectual or cognitive impairment to:

- understand what an enduring power of attorney and/or will is; and
- instruct a lawyer to prepare an enduring power of attorney and/or will for them.

Wills and enduring power of attorney

A Guide for Supporters

Overview

This document aims to help you (the Supporter) to understand your role and the process that will be followed to support an Adult to have a will and/or enduring power of attorney prepared by a lawyer.

For the purposes of this document and associated resources an Adult is someone with a cognitive or intellectual impairment. We use the term “the Supporter” to describe the person who will help the Adult to have a will and/or power of attorney prepared.



The role of the Supporter

Your role as Supporter is to use the information that has been provided to you to help the Adult to form an understanding of what a will and enduring power of attorney is so that they are able to make decisions about what they would like their will to contain and who they would like to appoint as their attorney.

You should know the Adult well and be someone whom the Adult trusts. You will have developed your own way of communicating with the Adult effectively. This approach should be used together with the information that has been provided to you.

When supporting the Adult it is important that you:

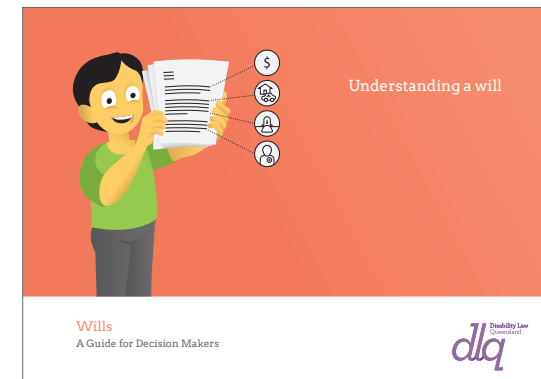
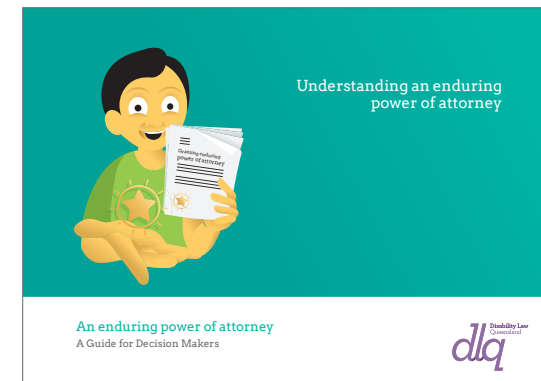
1. respect and value the Adult's right to make their own decisions;
2. avoid using your role as a way of advancing your own or any other person's interests; and
3. be able to spend as much time as is required to support the person to understand what a will and enduring power of attorney is and make their own decision about what they would like their will to contain and who they would like to appoint.



Preparing to support the Adult

Before beginning to support the Adult it is important that you:

1. Read the resources *“Wills – A guide for decision makers”* and *“An enduring power of attorney – A guide for decision makers”* to make sure that you understand what a will and enduring power of attorney is and that you are familiar with how the resource should be used.
2. Get a copy of a will and enduring power of attorney that you can show the Adult – you can use yours or an example provided by your lawyer.
3. Gather information about the Adult’s assets so that you can help them to identify what they own. It is important to remember that the Adult’s assets are only the things held in their own name. Funding for the provision of services for the Adult and assets held in trust for the benefit of the Adult are not their assets.



The role of the lawyer

A lawyer will prepare the will and enduring power of attorney for the adult. The lawyer should ensure that the Adult understands what a will and enduring power of attorney is and should ensure that the Supporter or others are not influencing the Adult. This can be described as assessing the Adult's capacity.

Lawyers have a number of ethical and legal obligations that are relevant to the assessment of capacity. One of these duties is to follow lawful, competent and proper instructions. This means that they are required to assess and determine whether their client has the capacity to provide them with instructions. To do this the lawyer will assess whether the Adult:

1. understands the nature and effect of a will and enduring power of attorney;
2. is able to communicate this in some way; and
3. is able to do so freely and voluntarily.

The lawyer will usually also use a medical assessment to assist in their assessment of the Adult's capacity.

When the lawyer is assisting the adult they may ask to have some time alone with them to confirm that they are not being influenced to make decisions that they do not want to make. This is routine and does not mean that the lawyer is suspicious of you. It is important that you explain this to the Adult before the appointment to make sure that they are comfortable with being alone with the lawyer. If they are not comfortable with this you should let the lawyer know so that other arrangements can be made (for example having another person at the appointment who can stay with the Adult when you leave the room).



The Adult

The Adult will be the lawyer's client and will need to provide instructions about what they would like their will to contain and who they would like to appoint as their attorney. It will also be up to the Adult to decide whether they consent to a medical assessment of their capacity. The lawyer will need to speak to the Adult to obtain their consent.

The process

The following process should be explained to the Adult at the outset.

The resources "*Wills – A guide for decision makers*" and "*An enduring power of attorney – A guide for decision makers*" have been provided to you. You may like to use these resources as a basis for discussions and activities over whatever period of time it takes the Adult to form an understanding of what a will and enduring power of attorney is and to make decisions

about what they would like their will to contain and who they would like to appoint as their attorney.

It is also a great idea to show the Adult what a will and enduring power of attorney look like.

Once the Adult understands what a will and enduring power of attorney is and has decided what they would like their will to contain and who they would like to appoint as their attorney you should assist the Adult to make an appointment for the Adult to see a lawyer. At this time it is important to tell the lawyer about anything that may hinder or help the Adult in the appointment – for example: are they sensitive to light or loud noises? Are there topics that the Adult enjoys talking about or doesn't enjoy talking about? Are there particular drinks or snacks that would make them feel at home?

The lawyer will have an initial conversation or meeting with the Adult to explain what a will and enduring power of attorney is and to seek their consent to obtaining a medical assessment of their capacity.

At this time the lawyer may ask the Adult if they know who they would like their things to go to when they die and who they would like to be responsible for ensuring that their wishes are carried out (their executor) they will also ask the Adult who they would like to appoint as their attorney.

The Adult will need to go to see their doctor or specialist to have the medical assessment undertaken. The lawyer will either send the letter directly to the doctor or provide it to you and the Adult for you to take to the appointment.

After the doctor has provided their opinion on the Adult's capacity you should assist the Adult to arrange a second appointment with the lawyer.

The lawyer may begin the appointment by all meeting together. The lawyer is likely to ask whether the Adult is happy for you to be present at the appointment (to make sure that there is no breach of confidentiality).

For a will, during the appointment the lawyer wants to be satisfied that the Adult:

- a. understands what a will is

- b. has at least a **general awareness** of the nature, extent and value of their estate;
- c. understands who has a claim on their estate and be able to discriminate between the claims.

The information contained in the document "Wills – A guide for decision makers" should assist the Adult to understand these things.

For an enduring power of attorney, the lawyer wants to be satisfied that the Adult understands:

- a. they may, specify or limit the power to be given to an attorney and tell the attorney how to exercise of the power;
- b. when the power begins;
- c. once the power for a matter begins, the attorney has power to make, and will have full control over his finances and if he isn't able to make his own decisions they will also be able to make decisions about personal matters;

- d. that the Adult may end the enduring power of attorney at any time they are capable of making an enduring power of attorney;
- e. the power the Adult gives others continues even if they lose their ability to make their own decisions;
- f. at any time the Adult is not capable of ending the enduring power of attorney, they are unable to tell the attorney how to exercise the power.

If the lawyer is satisfied that the Adult has capacity they will ask the Adult to sign their power of attorney and will documents.

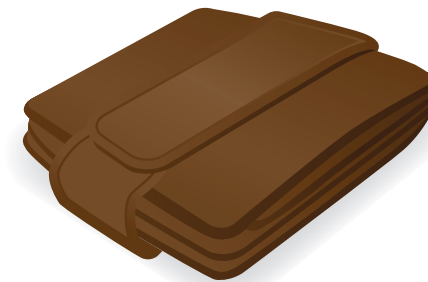
The will must be witnessed by two people who are not receiving a benefit in the will. The lawyer will make arrangements to ensure witnesses are present when the will is signed.

The power of attorney will be witnessed by the lawyer and each attorney must also sign the document. The signature of the attorneys can be obtained after the appointment if necessary.

The lawyer will make a detailed record of the appointment that explains how they assessed the Adult's capacity so that they can provide this as evidence if their assessment is ever challenged. They will keep this record on their file.

Costs

Before proceeding you should make sure that you and the Adult have confirmed how much the lawyer will charge. There is usually also costs associated with obtaining the medical report. You and the Adult will need to check with their GP or specialist what they will charge.



Instructions for lawyers

Lawyers should refer to the Office of the Public Guardian “Guidelines for Witnessing Enduring Documents” and Queensland Advocacy Incorporated’s “Queensland Handbook for Practitioners on Legal Capacity” so that they can ethically and competently assist people with intellectual and/or cognitive impairments to have the opportunity to have an enduring power of attorney and/or will prepared.



Contact Us

Address 40 Finsbury Street, Newmarket, Queensland 4051
Phone 07 3622 1250
Email admin@dlq.org.au

