



BALDOCK STACY & NIVEN
Solicitors and Notaries



PLANNING AHEAD
YOUR FUTURE

Information for older age & retirement

www.bsnlaw.com.au

Intro

Planning Ahead - Introduction

Baldock Stacy & Niven has written this brochure to assist our clients in planning for retirement. Most people make careful provisions to make sure they have enough money to retire upon. Not enough people make similar provisions for their legal affairs in retirement.

As we get older, we all hope that we will not lose the capacity to make decisions for ourselves but it is sensible to plan for such a possibility. Many people are reassured by knowing that they have planned ahead and made arrangements.

It is important to make these decisions now, whilst you are still able to rather than wait until it is too late and for your relatives and friends to deal with faceless public servants who will make decisions for you.

We ask you to read the accompanying information and then to do the following:

- Discuss it with your family.
- Decide on what preparation for your future you wish to do now.
- Decide on a suitable person or persons to make decisions on your behalf when you are no longer able to.
- Instruct Baldock Stacy & Niven to draw up the appropriate documentation.

This brochure covers the following areas:

- **a Will** which is properly drafted and which reflects your wishes
- **an enduring power of attorney** which allows you to appoint someone to make legal and financial decisions on your behalf

- **an enduring guardianship** which allows you to appoint someone to make personal, health and living decisions on your behalf
- **an advanced health care directive** which gives guidance to your health care professionals about your wishes for medical treatment in the future
- **a testamentary trust** which minimises tax and protects your assets



*Baldock Stacy & Niven has
been assisting its clients
prepare for retirement for
over 110 years*



Planning Ahead for your family

Wills

A Will is a document that you make during your lifetime which controls the distribution of your assets after your death. A Will is an obvious document for most people to put in place when they reach retirement age.

Even though a Will might seem obvious over 30% of people die without a current Will in place.

1.1 Why a Will is Important

If you are married, especially if you have children, it is vital to make a will. It is the only way to make sure that, no matter what happens to you, your loved ones will be financially secure.

When someone dies without leaving a will, it is the family that suffers. You may want to leave your spouse properly provided for if you die early. You may intend your spouse to have everything you own after your death. But you can only guarantee this if you leave instructions to that effect in a will.

If you leave no will, something quite different may happen. According to the law, your property and possessions may have to be divided up between different members of your family. Your spouse may be left with far less than you intended and may have to go through anxious weeks or even months of waiting before the question of "who gets what" is resolved by solicitors.

If you have children and grandchildren, there is even greater reason to make a will. Imagine the worst possible situation, where you and your spouse both die and one of your children has already died leaving grandchildren without a parent. In that situation, remote as it may seem, if you do not have a Will then the grandchildren will not receive anything under your Will.

1.2 Three simple steps to making a will

There is a common myth that making a will is complicated and costly. This is probably one of the reasons why up to one third of the population never bothers to make a will. But in fact, it is usually a relatively straightforward process, and it is surprisingly inexpensive for a fairly simple will.

The expense is minimal when you consider the cost of not making a will - the worry it can cause your family, and the legal bills they may have to run up to get your affairs sorted out. Here are three simple steps to have Baldock Stacy & Niven draft your Will.

Step One - Deciding on the beneficiaries

Something you need to think about is the question of who is to benefit from your will. If you have a spouse, you will clearly attach the greatest importance to protecting your partner's interests. You may have young children or grandchildren for whom you wish to provide.

Step Two - Appointing an executor

You will need to appoint an Executor - someone who will be responsible for seeing that the instructions in your will are carried out after your death. This can be a member of your family or a friend. Being a beneficiary of your will does not disqualify someone from being an Executor.

Step Three - Keeping your will secure

We will handle the formalities of drawing up your will in line with your instructions. It will need to be witnessed by two people who are not the beneficiaries. Usually the will is kept in safe custody at Baldock Stacy & Niven for safekeeping. There is no charge for this service. You will be given a copy for your records.

*A Will is a guarantee that
your assets are distributed
the way you want*

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Planning Ahead for Financial Decisions

Powers of Attorney

A power of attorney is a document appointing another person (called an attorney) to act for you **in relation to your financial affairs**. The document states what your attorney is authorised to do. This can be quite specific, or as general as required. Any lawful action taken by the attorney under a power of attorney is binding on you. It is therefore important to appoint someone you trust.

Even when you appoint an attorney, you can still personally carry out any transactions, such as banking and the sale of property, while you retain the ability to do so.

2.1 Duration of the Power of Attorney

A power of attorney continues while you desire it and it can be cancelled at any time while you have the capacity to do so. The duration may also be set for a particular period of time, for example a period while you are ill or while you are overseas.

2.2 Who can I Appoint as My Attorney?

The person you appoint should be someone you trust. He or she must be 18 years or over.

2.3 Enduring Power of Attorney

If you want the authority you give the attorney to continue when you lose the capacity to make your own decisions, you need to sign an **enduring power of attorney**.

An enduring power of attorney differs from a power of attorney in that:-

- The intention for the enduring power of attorney to continue is stated in the document; and
- A certificate by a solicitor is attached declaring that the solicitor explained the effect of the document to you before you signed.

2.4 Why have an Enduring Power of Attorney?

Making an **enduring** power of attorney is a way for you to legally appoint a person you choose to manage your financial affairs even if you later lose capacity to make these decisions for yourself.

2.5 When can an Enduring Power of Attorney be given?

An enduring power of attorney must be made when you are of sound mind. It is too late to make this appointment after you have lost the capacity to manage your own affairs.

You can make enduring power of attorney arrangements, which come into effect immediately, or one that remains 'dormant' and only comes into effect when you are unable to manage financial matters for yourself.



2.6 Attorney’s Power to use Money or Give Gifts

An attorney cannot give away your money or property unless the power of attorney form specifically allows the attorney to do so. Your Power of Attorney can be drafted to include a clause authorising an attorney to give reasonable gifts. If that clause is used the attorney will be able to use your money to make certain types of gifts. Allowable gifts are gifts to your relatives or close friends of a seasonal nature (eg. for a Birthday, Christmas or other religious holiday) or because of a special event (eg. for a birth or marriage).

2.7 Can an Attorney Use Money for Their Own Benefit?

As with gifts, an attorney cannot use your money for his or her own benefit, or the benefit of any other person, unless the power of attorney specifically allows the attorney to do so. Again, a clause can be drafted which will allow an attorney to use your money for housing, food, education, transportation and medical care for the attorney or a person nominated in the power of attorney (eg. your spouse). Again, the amount of the benefit must be reasonable, having regard to your financial circumstances.

2.8 What Safeguards are there?

In addition to the limitations on the powers of attorney set out above, there are a number of safeguards in place for enduring powers of attorney. The Guardianship Tribunal and the Supreme Court may review the making, operation and effect of an enduring power of attorney at the request of an “interested person”.



Planning Ahead for Health and Lifestyle Decisions

Enduring Guardianships

3.1 What is an Enduring Guardian?

An enduring guardian is someone you appoint, at a time when you have capacity, to make **personal, health or lifestyle decisions** on your behalf should you lose the capacity to make them for yourself. The appointment of an enduring guardian takes effect only if you lose the capacity to make your own decisions.

3.2 What Can an Enduring Guardian Do?

You choose the decisions you want your enduring guardian to make. These are called functions. You can give your enduring guardian as many or as few functions as you like. For example, you can authorise your enduring guardian to decide such things as where you may need to live or what medical treatment you receive.

Your enduring guardian must act within the principles of the Guardianship Act, in your best interests and within the law. You cannot give your guardian a function or direction that would involve them in an unlawful act, such as euthanasia.

3.3 What Can’t an Enduring Guardian Do?

An enduring guardian cannot make a will for you, vote for you, manage your finances or override your objections, if any, to medical treatment. He/she cannot consent to treatments that are defined as “special” medical treatments, for example, treatments such as new or experimental treatments. Only the Guardianship Tribunal can consent to special medical treatments.

3.4 When does it take effect?

The appointment of an enduring guardian takes effect only if you become unable to make your own health or lifestyle decisions. If there is any doubt about your capacity to make decisions, a doctor may have to assess your capacity.

3.5 Who can be an Enduring Guardian?

An enduring guardian must be 18 years or over. They should be someone you trust to make decisions in your best interests when you are not able to make these decisions for yourself.

In deciding whom to appoint, it is worth considering the willingness of the person to take on the role, as well as their age and health.

3.6 Appointing more than One Guardian

You can appoint more than one enduring guardian. You can appoint guardians to act **jointly** (the guardians must agree on all decisions), **severally** (each guardian can make decisions separately), or **jointly and severally** (the guardians can act together or separately).



3.7 Revocation on Marriage

The appointment of an enduring guardian is automatically revoked if the appointor marries after the date of appointing an enduring guardian.

3.8 How do I Appoint an Enduring Guardian?

- Step 1:** Discuss the appointment with your chosen enduring guardian. You should discuss the functions in detail and ensure that your guardian clearly understands your wishes.
- Step 2:** Discuss the appointment with family or other significant people.
- Step 3:** Contact Baldock Stacy & Niven to draft an Enduring Guardianship form.

3.9 Can I Change My Mind?

While you are still of sound mind, you can revoke the appointment of an enduring guardian.

3.10 What if My Enduring Guardian dies?

If the person you have appointed dies, resigns or becomes incapacitated, the Guardianship Tribunal can order another person to be appointed as enduring guardian on your behalf.

3.11 When Does an Enduring Guardianship End?

Enduring guardianship ends when you die, or when you revoke the appointment.



Planning Ahead for tax and other problems

Testamentary Trusts

4.1 Who needs a testamentary trust?

Testamentary trusts are not for everyone. They should only be considered after receiving financial and legal advice.

A testamentary trust should be considered by people with considerable assets and by anyone who is concerned about any potential beneficiaries.

4.2 What is a testamentary trust?

During your life you have worked hard and saved for your retirement. A testamentary trust is a tool which can be used to minimise taxation after your death as well as to protect your hard earned assets where a potential beneficiary is under a disability, or is a person who might waste their bequest (eg. a gambler or a bankrupt).

A testamentary trust is a discretionary trust (similar to a family trust) set up under your Will to control your assets after your death. Instead of leaving assets to named persons, they are placed in a trust and the trustee appointed by you distributes the income to your beneficiaries.

4.3 The benefits of a testamentary trust.

The greatest benefits of testamentary trusts are:

- **Protection from creditors** – to protect the bequest from creditors of a beneficiary. They can also protect the bequest from debts that a beneficiary may incur by giving guarantees for their spouse’s business debts.

- **High risk beneficiaries** – where a beneficiary is in a high litigation risk profession, or is potentially about to become bankrupt
- **Children facing divorce** – assets in the Trust are not assets of the beneficiary and the Family Court cannot make any order in relation to them.
- **Problem relatives** – where a child is a gambler, bankrupt or under a disability.
- **Education** – Grandparents often like to leave bequests via a Testamentary Trust for the payment of school fees for their grandchildren. This is more tax effective than leaving a gift to their children for the same purpose.
- **Tax benefits** – children have a higher tax free threshold, and there is an ability to split income through the trust.

4.4 The tax benefits

Under tax laws a child under 18 can earn only a small amount before paying tax at the highest marginal tax rate. Under a testamentary trust there is no tax payable on income up to \$6,000 per year. Where there is a testamentary trust children get the same tax treatment as adults.

There are also tax advantages from a Capital Gains Tax point of view. A testamentary trust even allows income splitting between spouses.

4.5 How to draw up a testamentary trust

There are various advantages and disadvantages of testamentary trusts. There are also complicated taxation laws that impact on testamentary trusts. We suggest that if you are interested in a testamentary trust you should speak to your accountant first.

Once you and your accountant are happy with the idea we suggest that you contact Baldock Stacy & Niven and we would be happy to assist you in drafting a testamentary trust.



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Planning Ahead for Health and Lifestyle Decisions

Advanced Health Care Directives, or “Living Wills”

5.1 What is an Advanced Health Care Directive?

An advanced health care directive or “living will” is a way of recording your future wishes or **instructions to doctors and health care workers**, for situations where you are unable to communicate with them or have lost the ability to make decisions for yourself.

This may not be necessary if you have a spouse, a person caring for you, or a relative or close friend who knows you well and will make decisions for you. If you communicate your wishes clearly, they should then inform your doctor or health care provider of your wishes if you were unable to do so.

Doctors are required to obtain consent from your “person responsible” if you are not able to consent to medical treatment. In the first instance, this would be your spouse.



5.2 Why have an Advanced Health Care Directive?

An advanced health care directive is a means of communicating your wishes by writing them down. An advanced health care directive can provide a means of stating precisely what you want done in particular circumstances.

For example, you might decide that in the event of a stroke which leaves you with extensive loss of function, you only wish to receive care to keep you comfortable and free of pain, rather than undergo invasive treatments.

5.3 Are Advanced Health Care Directives legally binding?

There is no law in NSW which deals specifically with advanced health care directives. However, an advanced health care directive may have legal force under common law and the NSW Health Department’s guidelines to doctors make it clear that they are to take advanced health care directives into account and be guided by them.

An advanced health care directive can assist an enduring guardian to be clear about your health care wishes. There are a number of ways in which an advanced health care directive can be stated.

Simply write down what you would like to be done. You might like to discuss this with your doctor.

The material in this brochure is not a substitute for legal advice and is only of general informational value. No person should act or refrain from acting solely on the basis of this brochure. It does not constitute legal advice and your possession of this brochure does not create a client/lawyer relationship. If you would like to discuss your particular circumstances please contact Baldock Stacy & Niven and we would be pleased to be of assistance to you.

About us

Baldock Stacy & Niven

Who are we?

Baldock Stacy & Niven is a firm of lawyers with offices in Western Sydney and in Central Western New South Wales. We have a heritage going back more than 100 years to the firm's founding by Herbert Henry Lee in 1891.

What is our aim?

Over a century after the firm's founding the focus remains unchanged: a belief in the importance of understanding our client's needs, of adapting to the continuing challenges of business, and of delivering quality professional services in a timely and cost effective manner.

Who are our clients?

Baldock Stacy & Niven has a wide range of city and country clients from various industries and lifestyles. We offer a broad legal practice offering professional legal advice and service in many varied areas.

Why concentrate on retirement planning?

Baldock Stacy & Niven sees retirement planning as an area which is misunderstood by clients. Most people make careful provisions to make sure they have enough money to retire upon. Not enough people make similar provisions for their legal affairs in retirement.

How do you arrange to see us about retirement planning?

If Baldock Stacy & Niven are already your solicitors please ring and speak to the solicitor you normally deal with.

If Baldock Stacy & Niven are not your solicitors please ring the office below that is most convenient to you.



Orange: (02) 6362 2022 - Anthony Short
Parramatta: (02) 9891 6444 - Stuart Niven
Blayney: (02) 6368 4022 - Michael Niven
Molong: (02) 6366 8492 - David King-Christopher



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For more information see our website
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Information for older age & retirement

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