



Wills and Estates

Policy and Procedures

Final 1.0
Accommodation, Policy and Development Directorate
Ageing, Disability and Home Care
Department of Family & Community Services NSW
September 2004
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**Family &
Community Services**
Ageing, Disability & Home Care

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The document ***Wills and Estates Policy and Procedures*** has been endorsed and approved by:

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1 Purpose

This document sets out policy supporting a person with a disability to participate in decisions regarding their finances and property and the disbursement of these by means of a Will.

The operational procedures are mandatory for ADHC and its operated services. Funded services may develop their own procedures or adapt and use these.

2 Minimum requirements

Every person with a disability in an ADHC funded or operated accommodation support service is given the opportunity to participate in the development of a Will. The Will is reviewed every 5 years or whenever their circumstances change to ensure that it reflects their current wishes.

Staff of ADHC funded and operated services must maintain documented procedures for developing and reviewing Client Wills and the distribution of a deceased estate that give effect to this policy and meet the principles set out below.

3 Position statement

Family and Community Services NSW, Ageing, Disability and Home Care (ADHC) supports clients to participate as fully as possible in decisions regarding their finances and property and the disbursement of these by means of a Will. Clients of ADHC funded or operated Accommodation Support services are encouraged to make wills for the disbursement of their funds and property. The distribution of a deceased estate will be conducted in a professional and timely manner.

4 Legislative framework

Disability Services Act 1993 and standards.

5 Target groups

People with a disability in ADHC funded and operated accommodation support services.

6 Principles

1. Clients have the right to participate as fully as possible in decisions regarding their finances and property and the disbursement of their estate by means of a Will.
2. Staff recommend that the client, family, guardian and/or advocate and financial manager review a client's Will every five years or whenever their circumstances change to ensure that it reflects their current wishes.
3. Following the death of a client, their estate is distributed in a prompt and timely manner.
4. Staff will demonstrate accountability when distributing a client's estate.

7 Explanation of terms

Accommodation support

The following service types are included under the accommodation support program: large residential, small residential, hostels, group homes, attendant / personal and in-home accommodation support care.

Bankers arrangements

When ADHC moved from the NSW Department of Health in 1989, the then Minister requested that the Protective Commissioner act as a banker for people living in what were then DoCS residences on behalf of DoCS (now ADHC Accommodation Support services).

Codicil

An addition to a Will.

Client Information System (CIS)

A data repository of client information on ADHC operated services.

Finance and Administration Manager

The Finance and Administration Manager is located within every Region and Large Residence and is an employee of ADHC. The role and function of this position is to provide strategic and operational support to the Regional Managers and/or Chief Executive Officer and service outlets on the efficient and effective allocation and monitoring of financial and asset resources within the service.

Financial Manager

The Office of the Protective Commissioner appoints a Financial Manager because the person with a disability:

- Cannot manage their financial affairs on their own;
- Has no suitable formal arrangement in place to help them meet all their financial needs; and
- Has no other suitable person willing to be legally appointed as his or her Private Financial Manager.

The Supreme Court or Guardianship Tribunal must believe that appointing the Protective Commissioner as financial manager is in the best interests of the person.

The Office of the Protective Commissioner provides a professional planned financial management service designed to meet the lifestyle needs of clients, taking into account their views and available financial resources.

Each client has a nominated 'Estate Manager' at the Office of the Protective Commissioner who consults with him or her regularly about his or her plans and needs for the future. Additional specialist professional services are available to assist on matters such as taxation, investments, legal services, disability issues and property. Where appropriate, external specialist advice is sought.

Manager

This term refers to Team Leaders, Home Care Services Branch Managers, Managers Intake and Referral and Assessment, Managers Access, Managers Service Quality and Improvement, Managers Service System Development and Unit Managers.

NSW Guardianship Tribunal

The Guardianship Tribunal is a legal tribunal. It appoints Guardians or Private Financial Managers for people with disabilities aged 16 years and over who are incapable of making their own decisions, and need a legally appointed substitute decision maker because no appropriate or safe informal arrangements are in place, or for some other reason.

If a Guardian or Private Financial Manager needs to be appointed, the Guardianship Tribunal will consider appointing a family member or friend. If this is not appropriate, the Tribunal will make a referral to the Office of the Protective Commissioner to appoint an Estate Manager.

If a Financial Manager needs to be appointed, the Guardianship Tribunal will appoint a family member or friend (supervised by the Protective Commissioner) or the Protective Commissioner.

The Guardianship Tribunal also consents to medical and dental treatments in certain circumstances for people who are unable to consent for themselves.

Office of the Protective Commissioner

The Office of the Protective Commissioner promotes and protects the human rights of people with disabilities. The Office of the Protective Commissioner focuses on managing the financial and property interests of its clients.

Private Financial Manager

A Private Financial Manager is a person who has been appointed by either the Supreme Court of NSW or the NSW Guardianship Tribunal to manage the financial affairs of a person with a disability.

Public Trustee

The Public Trustee of New South Wales is established by Government and is responsible for the making of Wills, the management of Trust funds, assets, deceased estates, private client services and other related products and services. The Public Trustee services are available to any person for a reasonable fee.

Senior Manager

This term refers to Regional Manager Service Development and Planning, Accommodation and Respite (Metropolitan), Area Manager (Rural) and Nurse Manager, Accommodation and Nursing Services.

Testamentary capacity

Testamentary Capacity is having the capacity to make and understand a Will. When making a Will, a solicitor and/or Public Trustee will need to be satisfied that the person has sufficient 'testamentary capacity' to understand what they are doing.

The solicitor or Public Trustee (and their file notes) may be called to give evidence of 'testamentary capacity' if the Will is contested. The Public Trustee does not charge a fee for drafting a Will. It is recommended that someone impartial, such as the Public Trustee, be appointed to execute the Will as it is a complicated process.

The client must understand the following in order to have testamentary capacity:

- The process of making a Will;
- The extent of their estate; and

- Appreciate the moral claims of friends and family on their estate.

Will

A Will is a legal document that clearly sets out the wishes of an individual for the distribution of their assets after their death.

8 Legislation

- Wills, Probate and Administration Act 1898 No.13
- Trustee Act 1925
- The Inheritance Act 1975
- The Guardianship Act 1987
- The Freedom of Information Act 1989
- Disability Services Act 1993
- The Protected Estates Regulation 1995
- The Privacy and Personal Information Act 1998

9 Resources and guidelines

ADHC Code of Conduct and Ethics 2004

Questions of rights, a guide to the law and rights of people with an intellectual disability 1989

Family Relationships Policy and Procedures

Public Sector Management Act (1996)

Intellectual Disability Rights Service, 2nd Edition 1998, Redfern Legal Centre Publishing

Wills for Persons Lacking Will – Making Capacity, 1992, Report of Community Law Reform Program

Interagency Protocol between ADHC and the Office of the Protective Commissioner

Health Care Policy and Procedures

Palliative Care Policy and Procedures

Individual Planning Policy and Procedures

10 Procedures for services operated by ADHC

10.1 Client Wills

1. During the development of the individual plan, the Manager discusses with the client, family, guardian or financial manager the need to make a will and requests

their involvement in the process. The outcome of the request is documented on the client file.

2. The Manager will refer a client to the Public Trustee to establish the client's 'testamentary capacity' (see explanation of terms) prior to making a will.
3. The Manager will consult with the client, family or guardian about who will support the client to attend the appointment with the solicitor or Public Trustee. If no support is available for the client to attend the appointment, the Manager arranges for an independent advocate to be involved in the process. The Manager then makes the appointment with the Solicitor or Public Trustee and notifies the people attending.
4. The Manager documents a statement noting the existence of a will, the name and contact details of the 'next of kin' and where the will is retained.
5. If the client has previously developed a will, the Manager recommends that the client, family, guardian or financial manager reviews the will every five years or whenever their circumstances change, for example on the death of a family member or executor/executrix or if a substantial change occurs to their assets. The Manager and/or delegate records on the client file when the five year review is due.

10.2 When a client dies intestate (without a will)

1. The Manager ensures that a copy of the Death Certificate is obtained from the Funeral Director and/or legal representative of the deceased estate and put on the client's file.
2. The Manager informs relevant external services of the death of the client in writing (Client death policy and procedures). The Death Certificate is required as proof when notifying services.
3. When a client dies without a will (dies intestate), the Manager calls the Public Trustee Office on 9252 0523 and informs them of the death and that the person resided in an ADHC operated service and asks for instructions on how to distribute the client's estate. The Manager will inform the Public Trustee if the client has a Financial Protection Order (Financial Manager). The Public Trustee will advise a course of action for the Manager to complete. The Manager documents the instructions in the client's file.
4. The Manager informs the appropriate Senior Manager (see explanation of terms) of the instructions given by the Public Trustee to distribute the client's estate.
5. The Manager completes the instructions given by the Public Trustee Officer for the disbursement of the client's estate and records actions and places copies of all relevant paperwork in the client's file.
6. It is the responsibility of the Manager to report all known assets and liabilities to the legal personal representative of the deceased estate.
7. The Manager writes to the Finance and Administration Manager in the Region or Residence within two weeks of the death to inform them of the death of the client. The Manager requests the cessation of the accommodation fee and ensures there are no outstanding or over payments of the fees.

8. On completion of the distribution of the estate, the Manager and/ or delegate closes the client file and updates the Client Information System (CIS).

10.3 When a client dies with a will

1. The Manager ensures that a copy of the Death Certificate is obtained from the Funeral Director and/or legal representative of the deceased estate and puts the certificate on the client's file.
2. The Manager locates the client's will and contacts the legal representative of the deceased estate documented in the will.
3. The Manager photocopies all the documents requested by the legal representative of the deceased estate and places the copies in the client's file.
4. The Manager writes to the Finance and Administration Manager in the Region or Residence within two weeks of the death of the client to inform them of the death. The Manager requests the cessation of the accommodation fee and ensures there are no outstanding or over payments of the fees. The Manager notifies the Finance and Administration Manager of the legal representative of the deceased estate and their contact details. The Manager, Finance and Administration corresponds with the legal representative, forwarding outstanding accounts, over payments and any costs related to funeral expenses.
5. The Manager informs relevant external services of the death of the client in writing (refer to the client death policy and procedures). The Death Certificate is required as proof when notifying some services.
6. On completion of the distribution of the estate, the Manager closes the client file and updates the CIS.

10.4 Administration of a will

The role of the Finance and Administration Manager

1. On receipt of the letter from the Manager stating the client has died and the name and contact details of the legal representative of the deceased estate, the Finance and Administration Manager contacts NSW Businesslink to cancel the debit from the client's account to ADHC for accommodation fees.
2. The Finance and Administration Manager ensures that the client's accommodation fees are up to date and bills the client's estate for any outstanding fees or reimburses the client's estate for over paid fees.
3. The Finance and Administration Manager forwards the reimbursement and/or outstanding accounts to the legal representative of the deceased estate (if the client has a will) or the Manager if the client died intestate. The Finance and Administration Manager writes to the Manager and legal representative of the deceased estate and informs them of their course of action and provides a statement of the client's accommodation fees at the time of death.

10.5 Death of a client of the Protective Commissioner

1. On the death of a client of the Protective Commissioner, the Manager notifies the Public Trustee within one week of the death.

2. A Financial Management Order ceases to be in force when a client dies. However, Financial Managers are still required to lodge a final accounting of their administration to the date of the person's death. Securities held by the Protective Commissioner and any funds held in the Protective Commissioner's Common Fund will be released to the legal representative of the deceased estate.

Contact Details

Office of the Protective Commissioner

160 Marsden St

Parramatta NSW 2124 Or

144 Clarence St

Sydney NSW 2000

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Telephone: (02) 8688 2600 or 1300 360 466

Fax: (02) 8688 9783 TTY: 1800 882 889

E-mail: opcmail@opc.nsw.gov.au

<http://www.lawlink.nsw.gov.au/opc>

10.6 Clients as beneficiaries

Clients can be a beneficiary of a will. Clients may sometimes appear to be discriminated against. In a case where a client appears to have been discriminated against, staff support the client to access legal advice. Staff will refer clients to the following services for legal advice:

- The Protective Commissioner (if they are a client of the Commission);
- Public Trustee of NSW;
- Intellectual Disability Rights Service;
- Other legal services.