



Duncan.Legal

planning for life...

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WHAT WE DO

Duncan. Legal offers a personalised and caring service with a special focus on assisting families with disability.

We can help you with your Estate Planning (Wills & Powers of Attorney) and provide advice & guidance on Guardianship & Administration, Supported Decision Making and Protective Trusts.

We are committed to educating families with disability on their Estate Planning options. We release a newsletter 4 times a year and hold regular webinars and presentations.

If your school or organisation would like to avail yourselves of a webinar or face-to-face presentation, please call or email us.

Visit the [Duncan.Legal](https://www.duncan.legal) website for more information.

Should I obtain Guardianship/ Administration Orders when my child with a disability turns 18 years?

When a person attains 18 years, the law presumes they have capacity to make decisions for themselves. Parents and carers are often worried how they can continue to legally manage the affairs of a child with limited or no decision-making capacity once that child becomes an adult.

At Duncan.Legal, we are often asked by clients whether they should lodge an application to the Victorian Civil and Administrative Tribunal (“VCAT”) for Guardianship and/or Administration Orders in anticipation of their family member with a disability transitioning into adulthood.

Our response is always the same – don’t make application to VCAT unless you absolutely have to!

A Guardianship Order appoints a Guardian for another person (“the represented person”) who lacks sufficient decision making capacity to make decisions for themselves. Specifically, a Guardian may make decisions on the represented person’s behalf about their personal and lifestyle matters, such as where that person lives, their health care, and their access to services, etc.

An Administration Order appoints a person to manage the financial affairs of a represented person.

If you are able to set up the affairs of the person with a disability and manage them independently once they become an adult without these Orders in place, then we recommend that you do so.

It is often easier to put infrastructure in place to manage the financial affairs of a person with a disability before they turn 18 years of age. Have the necessary bank accounts established and banking access protocols in place. Move any assets that may become problematic to manage later on. Make sure that you are the appointed Centrelink Nominee for the person, with the ability to receive all correspondence, and transact on behalf of the person.

However, it may be that you do need Guardianship and/or Administration Orders to be able to do certain important things for the represented person that cannot be achieved any other way. Often you will need to put some medical evidence of the person’s lack of decision making capacity before VCAT.

VCAT will only make Orders if you can show that they are **needed**, and even then will only make the **least restrictive orders possible** to achieve the purpose for which they are made. However, if VCAT is satisfied that the represented person will never have capacity for certain types of decision making, it can mean that Guardianship and/or Administration Orders may need to be in place for the represented person's lifetime.

Duncan.Legal frequently hears from many clients who express regret at ever having applied to VCAT, particularly in relation to Administration Orders. The annual reporting requirements to VCAT are onerous, and every cent expended must be accounted for. Additionally, VCAT can sometimes require certain assets to be managed on behalf of the represented person in a way that does not align with your way of doing things, or it may require certain assets to be transferred into the name of the represented person. Some Administrators do not welcome this level of scrutiny or control.

If your family member has a disability affecting capacity that is permanent and VCAT has determined that it is appropriate to appoint an Administrator, then for the rest of the represented person's life, they will require an Administrator. Once you have an Administrator appointed you can never cancel the appointment - there must always be someone who fulfils the role.

All this being said, there are many circumstances in which VCAT Orders for Guardianship and Administration are appropriate and proper.

At Duncan.Legal we recommend that you consider carefully whether you need VCAT Orders to continue to care for your person with a disability into their adulthood before making any applications. If Duncan.Legal can be of assistance in relation to this question, please do not hesitate to make contact.



Duncan.Legal's now reaching into NSW

Duncan.Legal was excited to present 2 webinars for Down Syndrome NSW last year on Disability Estate Planning and Special Disability Trusts.

Also, a representative at the NSW Council for Intellectual Disability interviewed us late in 2022 regarding the Victorian Supported Decision Making principals in order to further advance NSW's own law reform.

We are thrilled to have been asked back again in 2023 with further webinars planned for April and September.

It gives us much pleasure to share information further afield than Victoria in the world of disability.

Payment Instalment Plans

We understand that in the current economic climate there are many pressures on the family budget.

Avoiding proper Estate Planning or putting it on the back burner when there is a family member with a disability, is a common occurrence but not always the wisest move.

It is important that you have a Will & Powers of Attorney in place to protect your vulnerable beneficiary if something should happen to you.

Duncan.Legal provides the option of an agreed **Payment Instalment Plan**.

We do not charge interest (*unless you fall more than 3 months behind*), and repayments can be negotiated in **weekly, fortnightly** or **monthly** instalments at an amount that you can comfortably afford.

Call us today to find out more.....



Estate Planning – who to appoint??

Some of the most difficult decisions that need to be made when embarking on your Estate Planning journey are who to appoint in the important substituted decision making roles of:

- Enduring Power of Attorney (Financial & Personal);
- Medical Treatment Decision Maker;
- Executor; and
- Trustee in relation to testamentary trusts.

Most couples first appoint each other to these roles, however it is advisable to have ‘second tier’ or ‘alternative’ appointments in place. If you both pass away together or are, for example, in an accident where one dies and the other is seriously injured and unable to make decisions, you need other trusted person(s) to step in to make decision on your behalf. Similarly, if you are single you need trusted persons to step in on your behalf in the first instance.

These appointments are even more significant when the life-long needs of a special needs child or dependent adult are factored in.

When considering who to appoint, you may need to consider:

- **Distance** – family or friends that live a long distance from you may have difficulty in acting on your behalf as a POA, Executor of your estate or Trustee of a trust that is set up in your Will. When immediate decisions may need to be made such as medical treatment decisions, time zone differences should be taken into consideration. Someone who lives locally would more easily be able to act quickly & effectively.
- **Age** – as your family members or friends age, their ability to make decisions not only for themselves but for you begin to wane. It could be time to consider the next generation below you. However, you may need to take into account that nominating someone that is too young could have its own challenges around inexperience and naivety.
- **Role suitability** – consider how suitable your family member or friend is for the role that you wish to nominate them for. For instance, a person that struggles to manage their own finances may not be suitable as your Financial Attorney, Executor or Trustee but may be better placed to act as a Medical Treatment Decision Maker.
- **Foreign Residency** – If any of your appointees are non-residents for Australia Taxation purposes, you need to be careful not to appoint them solely to the roles of Executor or Financial POA. You do not want your assets taxed as a foreign trust.

Your choice as to who you would like to nominate in these roles is important and should be very carefully considered. These nominees will need to make decisions on your behalf that may have an impact on you or a vulnerable family member. When the time comes for your representatives to act, their role is to make the choices that you would make for yourself if you could. Be certain that the people you choose to represent you, know you very well and are aware of your wishes around medical treatment in particular.

Make a 3-5 year Estate Plan and review your documents regularly. Most people are willing to accept a particular role for a specified period, but more reluctant to commit if the time frame is open ended. Talk to them before you execute your new documents, as it can come as a shock and they may decline to act if they were unaware of your nomination.

Consistent Naming Conventions

It is not uncommon for us to have clients whose naming across their ID documents and on asset ownership documents do not match. Their names may be recorded in various forms – full name, missing middle name, first & middle names transposed, hyphens (that should or shouldn't exist), abbreviations, spelling errors & miscellaneous pet or nicknames.

If your ID documents do not match other important documents and asset holdings (such as your Will, your Superannuation account, insurance, mortgage, house title etc.) you will from time to time, run into difficulty proving who you are in order to access, claim or obtain information or original documents from these various institutions.

You may also make the job of your Financial Power of Attorney and Executor more onerous and expensive than it needs to be! Considerable time & effort would be required to prove your identity once you have lost the ability to do it yourself, or you have passed away.

In this era of data-matching, it is really important that the way you are named in relation to your ownership of assets, exactly matches your primary ID. If there are inconsistencies, we recommend that you take the necessary steps now to ensure your documents are amended, so that the way you are named is uniform across all of your assets and your primary forms of ID.

It is easier (and kinder) for you to attend to this now whilst you have capacity, rather than for your Legal Personal Representative(s) to have to do this after you have lost capacity or died.

Estate Planning Audit

Duncan.Legal offers all clients an Estate Planning (EP) Audit with the **first ½ hour of the first appointment free-of-charge**. Margaret will meet with you to understand your estate planning goals, your personal circumstances and the complexity of your assets.

At the end of the appointment, we can provide you with an estimate of the cost to update your estate plans (Wills & Powers of Attorney etc). You take the estimate away with you and consider whether you would like to proceed further.

Make your New Year's Resolution a worthwhile one, take the first step in your Estate Planning or update your existing plans to better reflect your family's situation!

To arrange your EP Audit, contact Lee on 9077 7731 or email leesmart@duncanlegal.com.au





Duncan.Legal Webinar Recordings

'Disability Estate Planning' Webinar	\$99.00 (incl GST)
'Supported Decision Making' Webinar	\$55.00 (inc GST)
'Special Disability Trusts' Webinar*	\$77.00 (inc GST)

Our webinars are an inexpensive way to receive relevant disability specific information you need to commence your estate planning journey in the comfort of your own home.

*Why not have a look at our new **Special Disability Trusts Webinar**? It includes the Indexed Spending Limits for 2022/2023 Financial Year. It's our most popular webinar!

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