IMPORTANT – This Document only provides general information.
It is not intended to be a substitute for you getting your own specific legal advice.

Making Financial Decisions After Turning 18

About this factsheet

The aim of this factsheet is to help both people with intellectual disability and their parents to be prepared for making financial decisions when the person with intellectual disability turns 18.

This fact sheet has information about:

- A person with intellectual disability making their own financial decisions after they are 18 years old
- when a Power of Attorney may be required for making decisions on behalf of a person with intellectual disability
- when to ask the Guardianship Tribunal for orders to appoint a person to be a decision maker for the person with intellectual disabilities

Please note- for the purpose of this document, The Guardianship Division of the NSW Civil and Administrative Tribunal (NCAT), will be referred to as the Guardianship Tribunal.

About the Intellectual Disability Rights Service (IDRS)

The Intellectual Disability Rights Service (IDRS) is a specialist community legal centre in New South Wales. IDRS provides legal advocacy, support, information, training and publications to promote the rights of people with intellectual disability. For details about the services provided by IDRS, please visit **www.idrs.org.au**

Who is considered a child, or an adult?

According to the law:

- a child is a person under 18 years of age
- an adult is a person 18 years or older

Parental authority over a child (a person under 18 years of age)

In most cases, parents have an automatic authority to make decisions for their children who are under the age of 18. This authority is recognised by government and financial institutions, and parents are allowed to make financial decisions and transactions on behalf of their children.

Turning 18

When a person with intellectual disability turns 18, they may be able to make their own financial decisions. This is especially true if they have received education and training in this area. The parents of the person with intellectual disability can continue to advise and help their child with intellectual disability to make financial decisions, but in most cases, a parent is not entitled to make a financial decision against the wishes of their child with intellectual disability after they turn 18.

Parental authority over an adult (a person who is 18 years of age or older)

The automatic authority parents have over their children to make financial decisions ends when a young person turns 18 and becomes an adult.

Parents may no longer be allowed to interact with government or financial institutions on behalf of their children. The parents of a person with intellectual disability may be informed by government and financial institutions that they need to have a Power of Attorney, or an order from the Guardianship Tribunal, to continue making decisions for their children. This fact sheet shows that this is not always true.

Making Decisions

An adult with intellectual disability is legally able to make a decision, if they:

1. can understanding the facts,

   and

2. can understanding the main choices,

   and

3. can weigh up the results of those choices,

   and

4. can understanding how the results will affect them,

   and

5. can communicate the decision.

There are two legal phrases that are commonly used which mean that a person is legally able to make a decision, they are:

- "being able to understand the nature and effect of a particular decision at the time it is made", or
- "having capacity".

Is it possible to make a decision?

The following checklist is to help indicate whether a decision can be made for a particular financial decision involving a person with intellectual disability.

If the answer to at least one of the questions below is 'Yes', then a decision can be made.

1. Can the adult with intellectual disability make the decision alone?
2. Can the adult with intellectual disability develop the understanding and skills to make the decision alone?
3. Can the adult with intellectual disability make the decision with explanations given by their parent or a carer in a supporting role?
4. Can the adult with intellectual disability make use of arrangements existing before they became an adult?
5. Can the adult with intellectual disability make use of alternate arrangements?
6. Does the adult with intellectual disability already have an attorney appointed under a General Power of Attorney who can be the decision maker for the financial decisions, or, can they appoint an attorney now?
7. Does the adult with intellectual disability already have an attorney appointed under an Enduring Power of Attorney who can be the decision maker for financial decisions if they lose capacity at a later time, or, can they appoint an enduring attorney now?
8. As the parent, do you need to ask the Guardianship Tribunal to appoint a financial manager for them to make the financial decisions?

Communicating the decision

An adult with intellectual disability can communicate the decision they have made by a variety of methods. For example, a person may nod or shake their head, use an assistive device to indicate the decision, make sounds or speak, write their mark or use a signature.

Does an adult with intellectual disability have to be able to write their signature?

If a signature is required, the adult with intellectual disability can make their mark as best as they can.

A signature, or a mark is usually required on documents relating to financial transactions, contracts, deeds, permissions, declarations, or printed forms etc.

What is a signature?

For legal purposes, a signature is a sign, mark, name, stamp or proxy which indicates an intention to be bound by the contents of the document. Beyond that, there is no law prescribing the form that a signature must take.

A signature can be any version of the person's name, as long as it has been adopted by the person with intellectual disability for the purpose of authenticating a document.

If there are doubts about the signature, there must be evidence to show that the person with intellectual disability had the intention to sign the document in question.

What is a Power of Attorney?

A Power of Attorney is the legal authority one person gives to another person to act on their behalf in financial decisions.

A person who makes a Power of Attorney is called the p**rincipal.**

The person who is appointed to make financial decisions is called the **attorney**.

A person (adult or a child) with intellectual disability may appoint an attorney with legal authority to act on their behalf under a Power of Attorney. This can be done by an adult (or a child) with intellectual disability if they are able to understand the nature and effect of the Power of Attorney at the time it is signed.

If a person does not have capacity to make a Power of Attorney at the time it is granted, then the Power of Attorney is void and has no effect. A Power of Attorney also becomes invalid if the principal becomes of unsound mind, unless it is an Enduring Power of Attorney (see below).

The attorney should not make financial decisions against the wishes of the principal with intellectual disability unless they have become of unsound mind, and the Power of Attorney is an Enduring one. Such decisions however, should still be in the best interests of the principal as far as possible.

A Power of Attorney **cannot** be used for lifestyle or health decisions.

Enduring Power of Attorney

An Enduring Power of Attorney is a Power of Attorney that is made to continue even if the principal later becomes of unsound mind. An application to the Guardianship Tribunal or the Supreme Court is needed to revoke an Enduring Power of Attorney if the principal becomes of unsound mind.

General Power of Attorney

A Power of Attorney may be "**general**", which means that the attorney may act on behalf of the principal in all financial matters without any limitations

Adding restrictions and directions to a Power of Attorney

A Power of Attorney can be limited to specific matters, limited in time, or in place. These restrictions and directions must be stipulated in the Power of Attorney document.

Before making a Power of Attorney

The person with intellectual disability (the principal,) making a Power of Attorney needs to understand each of the points below. There may be other issues to consider depending on the circumstances and individuals involved.

The person with intellectual disability needs to understand that:

- they do not have to make a Power of Attorney
- they are giving the attorney complete legal authority to make decisions and act for them
- the attorney can do anything with the principal's property, including things that the principal may not want to do
  For example- using their money, taking money from or adding money to their bank account, buying goods and services with their money, selling their house, car, dog; signing a tenancy agreement for them, borrowing money for them which they will have to pay back, mortgaging their house and using their property as security for any loan
- the attorney does not have to seek the principal's permission in advance, or tell them after the event
- the attorney should be trustworthy, sufficiently responsible and capable of dealing prudently with the principal's funds and assets
- the attorney should carry out the principal's directions and provide an account of the decisions made and actions taken as their attorney
- the principal will be legally responsible for the attorney's decisions and any actions taken until the Power of Attorney is revoked or ended
- the principal can revoke the Power of Attorney at any time
- the Power of Attorney becomes invalid if the principal becomes of unsound mind, unless it is an Enduring Power of Attorney
- an Enduring Power of Attorney is considered irrevocable if the principal becomes of unsound mind. An application to the Guardianship Tribunal or the Supreme Court is needed to revoke an Enduring Power of Attorney if the principal becomes of unsound mind.

How to make a power of attorney

There is a standard Power of Attorney form that is used which should be prepared by a lawyer, signed by the principal, and witnessed by the lawyer. The lawyer must be satisfied that the principal has capacity to make a Power of Attorney. The lawyer may need to get an opinion from a doctor or disability professional if the lawyer is uncertain about the person's capacity to make a Power of Attorney.

How to revoke a power of attorney

A Power of Attorney can be revoked or changed at any time if the principal has capacity to do so. There is no set or prescribed form for revoking a power of attorney. There are standard forms available to revoke a Power of Attorney, but usually a letter is sufficient.

Whether you use a form or a letter, a copy must be provided to the attorney to ensure that they know that the power of attorney has been revoked. If the power of attorney has been registered, it is also advisable to register the letter or form used to revoke the Power of Attorney.

A Power of Attorney is not valid after the time the principal has become of unsound mind unless it is an Enduring Power of Attorney. A Power of Attorney can be revoked or changed by the Guardianship Tribunal, or the Supreme Court. A Power of Attorney is suspended if the Guardianship Tribunal makes a financial management order.

An application to the Guardianship Tribunal or the Supreme Court is needed to revoke an Enduring Power of Attorney if the principal becomes of unsound mind.

Some Financial Decisions for Adults

1. Medicare

An adult with intellectual disability can apply for their own Medicare card.

If the adult with intellectual disability cannot understand and complete the Medicare forms, they can remain on the family's Medicare card indefinitely. There is no age limit to remain on the family Medicare card, and it is possible for the existing arrangements with Medicare to continue after turning 18. There are no extra forms to complete and Medicare does not need to be notified.

Extra benefits under the Medicare Safety Net

Some health problems may require a high level of medical attention, and the Medicare Safety Net is provided by Medicare to cover such extra medical costs.

To qualify for the Medicare Safety Net, the total medical costs need to reach a certain amount (a threshold.) Families with dependent children can remain under one Medicare Safety Net, and thereby combine their individual medical costs to reach this threshold. An adult can remain under their parents Medicare Safety Net until the age of 25 if they are recognised as dependents by Medicare.

After the age of 25, each adult over the age of 25 will have their own Medicare Safety Net, and the total medical costs to reach the safety net threshold will be calculated separately for each adult. Even though the adults over 25 have their own Medicare Safety Net, they can still remain on the same Medicare card as their parents.

2. Health Insurance

An adult with intellectual disability can have their own health insurance if they understand the nature and effect of the health insurance policy.

Insurance providers will enforce different limitations if the person with intellectual disability does not have the capacity to understand and operate their own health insurance policy. Depending on the provider:

- Some insurance companies will advise the parents that they need a Power of Attorney or a Financial Management Order from the Guardianship Tribunal for them to arrange and manage health insurance for their adult child with intellectual disability.
  In some cases, the company will cite privacy concerns and will not share any information with the parents until a Power of Attorney or an order from the Guardianship Tribunal is in place.
- Some companies will allow the adults with intellectual disability to remain on the same health insurance policy as their parents for a certain number of years
- Some insurance companies may only require a letter from a doctor stating that the adult with intellectual disability was incapable of operating their own health insurance to allow the parents to operate the policy for a certain number of years

All insurance policies also require full disclosure to the insurance company of all information that adds to the risk of the loss being insured against; therefore the parent or carer needs to provide all personal information that may be deemed relevant by the health insurance provider.

It is the position of IDRS that all adults with intellectual disability who do not have the capacity to arrange and operate their own private health insurance should have a uniform and easy-to-understand standard procedure for parents to arrange and operate health insurance for them.

3. Disability Support Pension (DSP)

DSP can be paid to a person with intellectual disability after they turn 16 years old. They can apply to Centrelink to receive DSP, and receive letters from Centrelink themselves.

Payment Nominee

The person with intellectual disability can authorise a "Payment Nominee" to receive their DSP. The nominee must use the pension money for the benefit of the person with intellectual disability.

Correspondence Nominee

The person with intellectual disability can authorise a "Correspondence Nominee" to act on their behalf and to receive copies of letters from Centrelink and deal with Centrelink on all matters.

Authority to Act as Nominee and Centrelink Nominee

If the person with intellectual disability cannot understand and complete the Centrelink forms, then a parent or a carer can make an application for an "Authority to Act as Nominee." In this case, evidence must be provided about inability of the person with intellectual disability pensioner to understand and sign the Centrelink forms.

This evidence could be any of the following:

- a medical report
- a social work report
- an assessment
- a letter from a disability service
- a Guardianship Order
- Financial Management order

The parent or carer can then become the "Centrelink Nominee". This enables the parent or carer to receive the DSP and letters on behalf of the adult with intellectual disability.

If a parent or carer is a Centrelink Nominee or a Payment Nominee, the DSP can be deposited into a bank account in the parent's or carer's name. This allows the parent or carer to withdraw money for the benefit of the person with intellectual disability.

To deposit funds in the carer's account, Centrelink requires that:

- payments are used for the exclusive benefit of the person with intellectual disability
- records of all payments received and funds spent are maintained
- Centrelink be allowed to inspect the records of payments received and funds spent at any time
- penalties to be applied if records are not provided when requested
- Centrelink be able to cancel or change the nominee at any time

IDRS recommends that a separate bank account be operated for the Centrelink payments received on behalf of the adult with intellectual disability.

Centrelink has a Financial Information Service that can help people with intellectual disability and their carers to manage their financial affairs.

4. Bank Accounts

An adult must have a bank account in their own name to be able to deposit and withdraw money from it.

An adult with intellectual disability who can make their own decisions (by themselves or with support and training,) can have their own bank accounts.

An adult with intellectual disability using a bank account must at least understand:

1. that they own the money in the account, and
2. how to put the money in the account, and
3. the bank holds their money, and
4. they can get their money back when they want it, and
5. how to get their money back, and
6. how to close the account.

If an adult with intellectual disability cannot understand and use a bank account then the parent or a carer can operate it on their behalf, however, to do this, the bank will often require the parent, or carer, to get either a Power of Attorney or a Financial Management Order from the Guardianship Tribunal. This is usually the banks' official requirement, but it is worthwhile to talk to branch managers about alternate arrangements that may be allowed by them.

As stated before, the DSP can be managed by a parent or carer for the benefit of a person with intellectual disability by having the DSP deposited into the parent's or carer's account as a Centrelink Nominee or a Payment Nominee.

Opening a bank account

To open a bank account the bank will require:

1. **a primary identification document** with a photo and name and address, (such as a passport or driver's license)
2. at least one other **secondary identification document** with a name and address, (such as a water or gas account or rates notice less than 3 months old, or an Income Tax Assessment Notice less than 12 months old, or a Medicare card or Health Care card or credit card etc).

5. Contracts

An adult with intellectual disability may be able to understand, or learn to understand, the nature and effect of a contract. The parent may also be able to help the adult with intellectual disability to understand the contract. In either case, the adult with intellectual disability can contract with other people or companies.

The adult with intellectual disability must at least understand that a contract involves:

1. exchanging one thing for another thing, (usually money for goods, services, or real estate), and
2. valuing the things being exchanged (in money terms), and
3. making sure that the value of the thing they receive is equal to or greater than the value of the thing they give, and
4. knowing that afterwards they may not be able to undo the exchange of things if they change their mind.

Entering in to a contract on behalf of a person with intellectual disability

If the adult with intellectual disability cannot understand the nature and effect of the contract, then an alternate arrangement would be for the parent to enter into a contract with the other party for the benefit of the adult with intellectual disability. For example, the parent enters into a contract to rent a television which is used by the adult with intellectual disability. In this example, the parent would be responsible for rental payments and returning the TV when the contract has ended

Financial Management Orders

A Financial Management Order may need to be made by the Guardianship Tribunal giving authority for the parent or carer to make the contract on behalf of an adult with intellectual disability if:

1. the adult with intellectual disability cannot understand the nature and effect of a contract, and
2. alternative arrangements cannot be made , and
3. if it is necessary for a contract to be made, and
4. the adult with intellectual disability had not appointed an attorney by making either an Enduring Power of Attorney or a Power of Attorney for financial decisions when they had capacity to do so

6. Making a Will

The law (with some exceptions) is that a person must be an adult to make a will.

An adult with intellectual disability can make a will if they understand the nature and effect of the will at the time that it is made.

The adult with intellectual disability must at least understand that a will involves:

1. leaving their property to the people named in the will after they die, and
2. being able to have a reasonable idea of the total value of their property, and
3. being able to work out who would normally be expected to have a share of their property, and
4. being able to weigh up competing claims in deciding how much each claimant will receive.

If it is shown that an adult with intellectual disability could not understand the nature and effect of a will at the time it was made, then the will is invalid.

A will **cannot** be made by another person on behalf of a person with intellectual disability by virtue of being:

1. their attorney under a Power of Attorney

   OR

2. their financial manager under a Financial Management Order

7. Tax

An adult does not have to do a tax return if their yearly income is below $18,200.00 (as of the 2012-2013 financial year.) On top of this, people on disability support pension have additional exemptions from taxation to any income they have. The tax office should be contacted for details of these exemptions.

Tax return

A tax return is the set of information most people need to provide to the tax office at the end of every financial year. A tax return allows the government to calculate the tax refund or tax debt for each person.

For example- additional taxes paid to the tax office can be reclaimed (tax refund) by filing a tax return.

A person with intellectual disability can complete their own tax return. They may also nominate their parent or a carer as their representative for the purpose of completing a tax return on their behalf.

If it is necessary to do the tax return, and a person with intellectual disability:

1. cannot understand a tax return or a tax form, and
2. cannot nominate a parent or carer to complete the tax return for them, and
3. has not previously appointed an attorney under a Power of Attorney,

then a Financial Management Order will have to be made by the Guardianship Tribunal to authorize another person to do the tax return for them.

A tax return can be filed without a Tax File Number.

8. A Tax File Number (TFN)

It is not mandatory for an adult to get a tax file number, but there are benefits in having a TFN.

For example - A person may have to pay more tax than necessary if they don't have a TFN. A TFN is also useful if money is kept in a bank account, because it may be required to pay tax on the interest. If a person does not have a TFN, the bank will deduct the tax on the interest from the account. The extra amount deducted by the bank can be claimed back by lodging a tax return with the tax office at the end of the financial year.

Any person over the age of 16 years can apply to get a tax file number if they wish to.

If an adult with intellectual disability does not have capacity to complete a TFN Application, then a parent or a carer can do it for them. To do this, the parent or a carer also needs do provide all of the following to the tax office:

1. a letter to the Tax Office explaining the disability and documents proving the disability, and
2. proof of identity of the person with intellectual disability, and
3. proof of identity of the parent or the carer completing the paperwork on behalf of the person with intellectual disability, and
4. explanations as to why they could not get a Financial Management Order from the Guardianship Tribunal, or, be appointed as attorney under a Power of Attorney

9. Court Proceedings

Criminal Court Cases

The law in NSW states that a child under 10 years cannot commit an offence.

A person 10 years or older can be charged by police for an offence and dealt with by a court.

The court may order that a person with intellectual disability is unfit to stand trial if it is shown that they:

1. lack the capacity to understand the nature of the criminal prosecution against them, and
2. lack the capacity to understand the court proceedings which they must defend

Civil Court Cases

In NSW the law states that a child under 18 years cannot commence or carry on civil proceedings unless the court appoints a tutor to manage those proceedings on their behalf.

An adult with intellectual disability can commence or carry on civil proceedings if they can understand the nature and effect of the proceedings. They can be helped and educated to understand the civil proceedings by support people including parents, relatives, friends, legal advisors etc.

Appointment of a tutor for adults with intellectual disability

A tutor must be appointed by the court to manage civil proceedings on behalf of a person with intellectual disability if:

1. an adult with intellectual disability cannot understand the nature and effect of the civil proceedings with or without help and support, or
2. the Guardianship Tribunal has made a Guardianship Order or a Financial Management Order

The tutor appointed by the court can be a parent, relative, friend, a guardian under an Enduring Guardian, a guardian appointed by the Guardianship Tribunal, an attorney appointed under a Power of Attorney, a financial manager appointed by the Guardianship Tribunal, the NSW Trustee and Guardian, etc.

When to ask the Guardianship Tribunal to make a Financial Management Order?

The Guardianship Tribunal will not make a Financial Management Order for financial decisions unless it is shown that there is a **need** to make such an order.

The Guardianship Tribunal only makes orders as a last resort, and will **not** consider making an order:

- if the matter is minor, and there is no such need for an order, or
- if existing arrangements are satisfactory, or
- if alternate arrangements are satisfactory, or
- for any problem which has not yet occurred

Some examples of when the Guardianship Tribunal may need to make a Financial Management Order are if:

- a financial decision is needed and the person with intellectual disability has no one who is able to make the financial decisions for them, or
- there is a dispute between family members about financial decision making, or
- the Power of Attorney needs to be revoked or changed, etc.

Who can be appointed as a financial manager?

If the person with intellectual disability has a suitable person in their life (a parent, spouse, relative, carer, or other person with an interest in their welfare,) then the Guardianship Tribunal may appoint one of them to be the financial manager. In this case, the appointed financial manager will be under the general supervision of the New South Wales Trustee and Guardian.

If the person with intellectual disability does not have a suitable person in their life, then the Guardianship Tribunal can appoint the New South Wales Trustee and Guardian to be the financial manager.

The financial management order need not deal with all of the financial affairs of the adult with intellectual disability.

For example, the financial management order may be limited to specific assets, such as compensation money held in a bank account. In this case, the adult with intellectual disability can still manage their own disability support pension payments.

Even with a Financial Management Order in place, the financial manager must:

- take into account the wishes of the adult with intellectual disability, and
- respect their freedom of decision making, and
- respect their freedom of action

The financial manager **can** override the objections of the adult with intellectual disability if it is for the benefit of the person with intellectual disability.
For example – preventing funds being spent recklessly, or to retain funds for the needs of the person with intellectual disability.

Reviewing decisions

The adult with intellectual disability can ask for a decision of the appointed financial manager to be reviewed by the New South Wales Trustee and Guardian.

The adult with intellectual disability can ask for a decision of the New South Wales Trustee and Guardian to be reviewed by the Administrative Decisions Tribunal.

The Financial Management Order can be reviewed, and if necessary, revoked by the Guardianship Tribunal or the Supreme Court.

Some of the useful documents to have when turning 18

These include documents (if available) relating to the adult with intellectual disability such as:

- the birth certificate
- doctor's letters and medical reports about their intellectual disability
- photographs
- school reports
- documents recording the person's name and address
- a passport
- a driver's licence
- an identity card from the Roads and Maritime Services
- an Appointment of an Enduring Guardian (if available)
- a Power of Attorney (if available) and orders of the Guardianship Tribunal (if available)

Contacts

- Ageing Disability and Home Care (ADHC) 8270 2000
  www.dadhc.nsw.gov.au
- Centrelink 132 717
  www.centrelink.gov.au
- Centrelink Financial Information Service 136357
  www.centrelink.gov.au
- Medicare 132011
  www.medicareaustralia.gov.au
- Roads and Maritime Services 132 213
  www.rms.nsw.gov.au
- Australian Electoral Commission 132 326
  www.aec.gov.au
- Australian Passport Information Service 132 232
  www.passports.gov.au
- Australian Taxation Office 132 869
  www.ato.gov.au
- The Guardianship Tribunal 1800 463 928
  http://www.ncat.nsw.gov.au/ncat/guardianship.html

IDRS T.C. October 2014