



**PUBLIC TRUSTEE**  
FOR THE AUSTRALIAN CAPITAL TERRITORY  
WILLS • ESTATES • POWERS OF ATTORNEY • TRUSTS

## Issue 2 ■ February 2015

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### JOIN US IN CELEBRATING SENIORS WEEK 2015

ACT Seniors Week 2015 will be celebrated from Saturday 14th to Sunday 22nd March.

During Seniors Week, PTACT will hold daytime and evening seminars on the importance of having an up to date Will and Enduring Power of Attorney and will advertise the dates and locations in the media in advance of the seminars.

The seminars will take the form of a panel presentation and all persons attending will be provided with a free Will consultation and Information Pack.

Keep an eye out also for PTACT at Stall 61 at the 'Seniors Expo', Thoroughbred Park, from 9.30am - 3.00pm Tuesday 17 March. Visit [www.cotaact.org.au/seniorsweek/events/expo.html](http://www.cotaact.org.au/seniorsweek/events/expo.html)

### WELCOME

Welcome to the second edition of 'Going Public'.

This issue deals with upcoming events happening at the Public Trustee for the ACT (PTACT) and concentrates on issues around capacity, loss of capacity, Enduring Powers of Attorney and touches on a related subject - Elder Financial Abuse.

In this issue we will explore the important and often forgotten area of making plans in the event of incapacity and related legislation, pitfalls, processes, safeguards and services available from PTACT.

We have provided articles on issues of interest prepared by Public Trustee staff, proposed changes to laws as well as information about forthcoming events, whilst busting some myths about the industry and what we do.

Our next issue in August 2015 will deal with what happens to our property and assets in the event of death, executorship, administration, Family Provision, challenges to the Will etc.

We trust you find *Going Public* interesting and informative.

**Andrew Taylor**  
PUBLIC TRUSTEE



### What we do

- **Wills** - Wills for ACT residents who appoint the Public Trustee as Executor.
- **Financial Management Services** - Under order of the ACT Civil and Administrative Tribunal.
- **Estates** - Permanence, trustworthiness and professionalism are vital in the choice of an executor.
- **Powers of Attorney** - Power of Attorney services (financial) for Will clients where you appoint the Public Trustee as attorney.
- **Trusts** - Act as trustee under court order, will or deed including Special Disability Trusts for those unable to manage their funds.
- **Unclaimed Money** - Pay claims associated with certain unclaimed money.
- **Confiscated Criminal Assets** - Administer forfeited assets restrained.
- **Official Visitors** - Provision of administrative services to Official Visitors.
- **GreaterGood** - Our own Charitable Foundation enables Canberrans to establish a charitable fund of their own.

## PLANNING AHEAD IN THE EVENT OF OUR INCAPACITY

The Australian Bureau of Statistics reported that, in 2014 Australians have life expectancy of 84 years for females and 79.5 years for males....among the highest in the world. Here in the ACT, we enjoy Australia's highest life expectancy....

However, Alzheimers Australia reports that....

- 342,800 Australians currently live with dementia (pop 23.78M)
- The number with dementia is expected to increase by 1/3 to 400,000 in less than 10 years
- dementia is the single greatest cause of disability in older Australians
- one in four people over the age of 85 have dementia

In short, we are living longer, but not necessarily with capacity.

We have seen a shift upwards in the median age of Canberra's population with a rapid rise in demand for nursing homes and aged care facilities. Given this changed demographic, it is vital that every person with capacity should plan ahead and consider the time in their lives when they may not have capacity to make decisions and choices.

## WHAT IS CAPACITY?

The NSW Government's publication "Capacity Toolkit", published in May 2008 tells us that the term 'capacity' has a legal meaning and is used to refer to an adult's ability to make decisions. Under the law every adult is presumed to have capacity.

## HOW CAN I PLAN FOR WHEN I NO LONGER HAVE CAPACITY?

Every adult in our community with capacity should consider a time when they may no longer be able to make decisions for ourselves. These include financial/property, health, welfare, lifestyle and legal decisions.

You can plan ahead by preparing an Enduring Power of Attorney (EPA). When you need someone to look after your financial affairs or make personal and medical decisions if called upon to do so, an EPA is a vital part of personal planning.



## WHAT IS AN ENDURING POWER OF ATTORNEY?

An EPA is a legal document through which you give the person you choose as your attorney, the power to manage your affairs while you are alive and even during your incapacity. An EPA may appoint separate persons to make decisions about different areas of decision-making.

The appointment may be for a fixed period and can be revoked by you at any time providing you still have the legal capacity to do so. An EPA ceases to have effect when you die. The executor named in your will then assumes responsibility for your estate.

There are two types of Power of Attorney -

### General Power of Attorney

Valid only while you have capacity and may be useful if you are going overseas or interstate for an extended period and you do not want the attorneyship to continue should you lose capacity.

### Enduring Power of Attorney (EPA)

Valid even if you lose legal capacity and allows your attorney to commence or to continue to manage your affairs even though you have become unable to give lawful instructions.

In either case you may wish to appoint an attorney now but delay the time when the attorney commences to act. In this way the documentation is prepared, signed and held, pending further advice. The attorney may act on your written request either immediately or at a later date.



## WHAT IF I DON'T HAVE AN ENDURING POWER OF ATTORNEY?

No need to worry....if you have not appointed an attorney and you lose capacity, or are incapable of managing your financial affairs for any reason, the ACT Civil and Administrative Tribunal (ACAT) may appoint a guardian to care for your personal and health care needs and/or a manager to care for your financial and property needs.

Our handy Fact Sheet "When you are unable to Manage your Affairs", published on our website at [www.publictrustee.act.gov.au](http://www.publictrustee.act.gov.au) may provide some answers to your questions.

## ACT CIVIL AND ADMINISTRATIVE TRIBUNAL (ACAT)

**ACAT is an informal judicial body which consolidates 16 former ACT jurisdictions and tribunals including the Guardianship and Management of Property Tribunal.**

ACAT provides legal authority in the form of guardianship and management orders, to the family or friends of disabled adult persons so that the disabled person's affairs, personal or financial, may be protected. ACAT can also review these appointments as well as make directions about EPAs.

The overriding principle observed by ACAT in making such appointments is that person to be protected must have impaired decision-making ability.

ACAT can make two separate types of orders - guardianship and management.

### Guardianship

ACAT may appoint a guardian to make personal decisions on behalf of a person who is incapacitated by illness, injury or intellectual disability. A guardianship order may be plenary (full), or a limited order.

### Management

ACAT may appoint a person to be a manager of the incapacitated person's financial (including property) affairs.

Examples of when these orders may be necessary include where a child has a mental or intellectual disability, has reached 18 years and one or both parents seek formal appointment as a guardian and/or manager. Other examples include where a person is incapacitated as a result of a road or other accident or where a person becomes incapable through the ageing process.

ACAT must be satisfied, firstly, that the person is suffering from a physical, mental, psychological or intellectual condition, generally evident from medical or professional carers' reports.

ACAT will preferably appoint a family member or a close friend, who is capable, willing and lives in the ACT, to be the Manager or Guardian.

In the event that this is not practicable or possible, ACAT may appoint the Public Trustee to act as Manager, or the Public Advocate to act as Guardian.

Two handy information guides are published by ACAT on its website - "Information for Guardians" and "Information for Managers" at [www.acat.act.gov.au](http://www.acat.act.gov.au)

## THE PUBLIC TRUSTEE AS MANAGER

When appointed as Manager, PTACT can only make financial and property decisions and not health, welfare or lifestyle decisions.

As a protective measure, we are bound by statutory decision-making principles and must consult the Protected Person, the family, guardian or carer/s, to ensure that available funds and resources are used to benefit the well-being and lifestyle of the Person.

### We collect money

We will collect and account for the Person's income, including pension entitlements, superannuation, rents, investments, dividends from shares and interest. We also pay accounts and bills and lodge social security returns and medical benefits claims.

We will establish a budget for the Person allowing for payment of bills such as accommodation, personal expenses, rents, rates, property repairs, gas, electricity, medical, hospital or nursing home charges.

### We manage property

We may be required to manage, buy or sell the Person's property; monitor a share portfolio; supervise rental properties and maintain investments.

### We prepare and lodge taxation returns

We are a registered tax agent and prepare and lodge income tax returns for our clients.

### We keep accurate accounts

Our accounts and annual statements provide a detailed and accurate account of our management.

### We will advocate for you in financial matters

Where needed, we will advocate on behalf of the Person to ensure that they receive their full financial entitlements.

## FINANCIAL MANAGERS OTHER THAN THE PUBLIC TRUSTEE

In many cases ACAT appoints a member of the Person's family or a friend as Financial Manager. In these instances, that person must lodge an account of their management each year with the Public Trustee. We examine these accounts on behalf of ACAT on payment of a small fee. Where we believe that the Manager is acting without reasonable care, or not in the best interests of the Person, we may recommend to ACAT that the disputed expenditure be disallowed.

Our Fact Sheet "Financial Management for Protected Persons"; and "Guidelines for the purchase and sale of real estate by private Managers", together with "National Standards for Financial Managers" may be accessed through the "publications" part of the Public Trustee's website at [www.publictrustee.act.gov.au](http://www.publictrustee.act.gov.au)

### GUARDIANS

A Guardian is usually someone concerned for, and in close contact with, the Person, such as an immediate family member or a close friend. The Public Advocate may also be appointed as Guardian.

The Guardian and Manager maintain close consultation about the Person's specific needs. As Manager, we will consult with the Guardian or family, to ensure that funds and resources are appropriately utilised to improve the protected person's quality of life. The Manager makes the final decision about the requested expenditure.

### REVIEW OF MANAGEMENT ORDERS

A Management order remains in force during its term, usually three years, until it is varied by further order or revoked. ACAT may review the circumstances of the Person and may continue, vary or revoke an order to ensure that their best interests are served.

### MANAGING THE PROTECTED PERSON'S FUNDS

The Public Trustee must ensure that Person's funds are managed and invested prudently. Funds are generally invested through the Public Trustee's Common Funds generating competitive returns.

### COSTS

A Manager may charge a determined fee for their services and may recover costs from the Person. The Public Trustee's charges have been structured so that a discounted commission is payable on income received from any government pension. The Public Trustee's fees do not cover the full cost of providing these services, as they are part of the Public Trustee's Community Service Obligations, partly funded by Government.



### WE WILL COME TO YOU...

If you are unable to visit us because you are incapacitated in some way eg in hospital, a nursing home or hospice, we will visit you to make your Will and Enduring Power of Attorney.

## FREQUENTLY ASKED QUESTIONS

**Q. What if I don't know anyone suitable to appoint as my attorney?**

**A. You can appoint the Public Trustee to be your attorney for financial and property matters or the Public Advocate for personal and health care matters.**

**Q. How old do I have to be to make an Enduring Power of Attorney?**

**A. You are legally able to make an Enduring Power of Attorney when you are 18 years and have capacity.**

**Q. What happens if I suspect that my attorney is mismanaging my affairs?**

**A. You may make application to the ACT Civil and Administrative Tribunal which can make directions about powers of attorney.**

**Q. Who can witness an Enduring Power of Attorney in the ACT?**

**A. Your signature must be witnessed by two persons both of whom must be aged 18 or above, and are not the attorney under an enduring power of attorney. One witness must be authorised to witness a statutory declaration and only one of the witnesses can be a relative of the principal or the attorney.**

## YOUR WILL/EPA INTERVIEW WITH THE PUBLIC TRUSTEE...

Your Will/EPA interview with the Public Trustee is designed to be simple yet comprehensive. Our qualified legal personnel can address your unique needs whether you are married, single, in a same-sex relationship or from another cultural background.

We provide Wills at no cost for persons of 60 years and over. In all cases however, a fee is payable for the preparation of an EPA. A typical Will/EPA interview will take less than an hour. All that is required are the details of your assets and your considered wishes in respect to beneficiaries. We take appointments from 7.30am on weekdays.

Your Will/EPA interview will determine your capacity to make a Will or an EPA, who to nominate as your executor/beneficiaries/attorney/s and any specific issues eg trusts, bequests to charity etc.

We will store your Will and EPA in safe custody at no cost.



**We will even provide you a free coffee at Mingle Espresso next door while you wait for your Will/EPA to be prepared.....**

## COMMON PITFALLS

- Failing to appoint someone who is capable, willing, understanding of the responsibility required, available long term, trustworthy or not subject to influence as your attorney.
- Appointing a person who is older than yourself as attorney who may not be available in your incapacity.
- Appointing a person who is overseas or interstate even though they may be needed for everyday matters.
- Making your own EPA and failing to observe legal requirements such as witnessing requirements.
- Registering an EPA. An EPA only needs to be registered when the attorney needs to deal with your real estate.
- Not discussing your EPA with your family.
- Failing to keep the document in a safe place accessible if required.



## MYTHS BUSTED

**MYTH -  
BUSTED**

**My EPA covers all decisions that can be made by an attorney.**

Untrue, your attorney may only make decisions in the area that your EPA specifically appoints them. There are also some decisions that an attorney may not make under any circumstances eg to marry, to donate organs or to vote.

**MYTH -  
BUSTED**

**Its better to have only one attorney.**

Not necessarily, this is up to you, but it's worth thinking carefully about it. Some EPAs only allow one decision maker plus an alternate. Where more than one is required, it is helpful if you have a good reason (e.g. siblings who should act together, or you are unsure if one should act on their own, or to allow the power to continue if one attorney dies or cannot act).

**MYTH -  
BUSTED**

**Making an EPA is expensive.**

No, a typical EPA prepared by the Public Trustee as part of your Will consultation will cost you a combined fee of no more than a few hundred dollars.

**MYTH -  
BUSTED**

**You should only appoint a family member as your trusted attorney.**

You are entitled to appoint any adult person with capacity as your trusted attorney eg partner, or friend. You can also appoint a professional such as the Public Trustee, a trustee company or a solicitor as your attorney.

**MYTH -  
BUSTED**

**My attorney is not entitled to charge for acting as my attorney.**

Untrue, the *Powers of Attorney Act 2006* provides that an attorney may recover reasonable expenses. You may provide in the document that your attorney may take investment fees. The Public Trustee is entitled to charge fees for acting as attorney in accordance with a scale of fees established by the ACT Attorney-General.

**MYTH -  
BUSTED**

**All Powers of Attorney must be registered.**

Untrue. In the ACT, a power of attorney need only be registered as and when the attorney needs to deal with the person's real property. If the power of attorney is not for financial and property needs, it does not have to be registered at all. Tasmania is the only Australian state that requires registration of all powers of attorney.

## SPECIAL DISABILITY TRUSTS - A WELCOME SOLUTION

As pensioners know, it can be difficult for anyone to live solely on a government pension so you can imagine how hard it is for a person with a disability to get by.

Concerned parents raise the question on how best to provide for their disabled adult child during their lifetime or under their will without adversely affecting the child's Centrelink Disability Support Pension. Fortunately there is an answer. Since 20 September 2006, families have been able to provide for a family member with a severe disability through creation of a Special Disability Trust with settlement funds of up to a maximum of \$500,000.

The income (and capital, if needed) of the trust must be applied for the care and accommodation needs of the beneficiary and attracts social security means test concessions for both the beneficiary and eligible contributors. The restriction to the beneficiary's care and accommodation costs initially created a problem for trustees in matching income to expenditure but fortunately, from 1 January 2011, this has been relaxed and currently the first \$11,000 in income can also be applied to discretionary needs of the beneficiary.

This relaxation has made Special Disability Trusts a practical vehicle to provide an additional income for disabled persons for life without adversely affecting their entitlement to the Disability Support Pension. Special Disability Trusts can be created by family either during lifetime or under will and additional information is available at [www.humanservices.gov.au](http://www.humanservices.gov.au)

Parents of children with a legal incapacity should give particular consideration to providing for a protected trust under their will including a power to create a Special Disability Trust. Call us for advice and assistance in establishing a Special Disability Trust.



## CHANGES TO ACT LEGISLATION

### *Guardianship and Management of Property Act 1991 (GMPA)*

New reporting requirement for Public Trustee.

The ACT Government has agreed to the insertion of a provision to make financial management by the Public Trustee an even safer option by including an annual accounts reporting requirement on the Public Trustee when acting as a financial manager. The purpose of this amendment is to increase transparency and provide a level of accountability by the Public Trustee in acting as financial manager.

### *Public Trustee Act 1985*

#### Amounts paid by trustee for person under disability

Section 25A(2) is to be amended to allow the Supreme Court to appoint the Public Trustee as a financial manager at the same time that they are appointed as trustee over a court damages award. This will allow the trustee to retain control over funds that are invested in superannuation.

## WOMEN AND ENDURING POWERS OF ATTORNEY

Of particular interest for women, are considerations relating to the holding of joint property with a partner or spouse in the event that the woman requires a bond for a nursing home and her money is tied up in the family home....this may become an issue where the spouse is also the attorney under an Enduring Power of Attorney (EPA).

Other considerations include -

- If you marry or enter a civil partnership with someone other than your attorney after you have made an EPA, the EPA may be revoked.
- If your marriage or civil partnership ends the EPA is revoked if the attorney was your former spouse or partner.

Most women in permanent stable relationships hold their real property as joint tenants with their partner/spouse. This means that both owners hold the property and that the property automatically devolves upon death to the surviving joint tenant. An EPA must recognise that, when empowering an attorney to manage their financial and property affairs, that dealings with jointly held property must be negotiated together with the other joint tenant, where the other person has capacity.

Another concern is where the woman's partner/spouse is joint tenant as well as attorney introducing a potential conflict of interest. Attorneys must not allow themselves to enter into transactions that create a conflict between their respective interests. Should an attorney use their power to transfer their joint tenant's interest to themselves, it is likely that the Land Titles Office would intervene.

In a national survey about Australians' attitudes to will and EPA making, the key concerns of many women were linked to the complexity and instability of family relationships and the problem of making decisions based



on one set of circumstances and implementing different decisions under another set of circumstances. For example, a positive relationship with a son or a daughter may be influenced negatively by an 'unknown spouse' in the event of marriage or remarriage. A number of older women were aware of the potential for hurt, tension, and change of family roles that could be created by telling different children about the content of wills and decisions regarding affairs.

Additionally there is also a concern amongst elderly women about the potential for elder financial abuse particularly around the point at which an EPA becomes active on the person's loss of capacity. There have been cases where this point has been blurred by a family member's need to gain early access to a perceived inheritance.

## TRAVELLING OVERSEAS?

The Department of Foreign Affairs and Trade (DFAT) advises that, each year almost 1,000 Australian travellers die overseas, usually through illness or accident. If you are over 18, you should consider making a will and an enduring power of attorney before you travel. These are probably the most important documents you will ever sign, so it's important that you seek expert advice.

Some states/territories may not recognise wills or powers of attorney prepared and witnessed overseas. If you are overseas and would like to make a will or an enduring power of attorney for use in Australia, make sure you contact a solicitor or the public trustee/advocate for your state/territory before you contact a foreign solicitor.



***In recent years, there have been several very complex and sometimes high profile cases of Australian citizens affected by either having an EPA or failing to have an EPA.***

### **Mrs A**

In 2011, the Sunday Telegraph reported that a former financial executive had siphoned almost \$400,000 from his mother's bank account and was being sued by his mother's financial manager for recovery of the money. The son had transferred money to himself from his mother, who suffered from Alzheimer's disease and lived in a nursing home. Mrs A had appointed her son as attorney under Enduring Power of Attorney (EPA) several years earlier. The Victorian Civil and Administrative Tribunal suspended the EPA and appointed the Victorian State Trustee as her financial manager, who launched legal action to secure and recover Mrs A's money. State Trustees were able to secure the repayment of \$100,000 and had taken steps to recover the rest.

### **Mr M**

Mr M was an Australian citizen under a financial management order by an Australian Guardianship Tribunal. He had a serious mental illness and, while his estate was modest, he had accrued sufficient funds to travel overseas where he taught English as a second language. Mr M became progressively unwell overseas having failed to take his medication. The situation became critical when Mr M alighted from a moving bus and broke his leg in several places. Mr M was admitted to a hospital and became progressively more unwell both physically and mentally. The financial manager for Mr M became aware of his circumstances when DFAT sought assistance to repatriate him. The financial manager was approached in order to enter into a deed under which DFAT would repatriate Mr M and he would undertake to pay back the cost of repatriation and sacrifice access to travel as his passport application would be immediately rejected.

Mr M's visa was due to expire and the overseas authorities were about to transfer him to a detention centre. His medical condition worsened and he was at risk of losing his leg. There was no guardian in place for Mr M.

An Australian State Guardianship Tribunal heard an application for the urgent appointment of the Public Guardian to make decisions in regard to Mr M, including the decision to repatriate him. The financial manager entered the Deed of Agreement with DFAT and Mr M was successfully repatriated from China and treated for both his medical and psychiatric conditions.

## ELDER FINANCIAL ABUSE

Elder abuse is any behaviour or action within a relationship of trust that harms an older person.

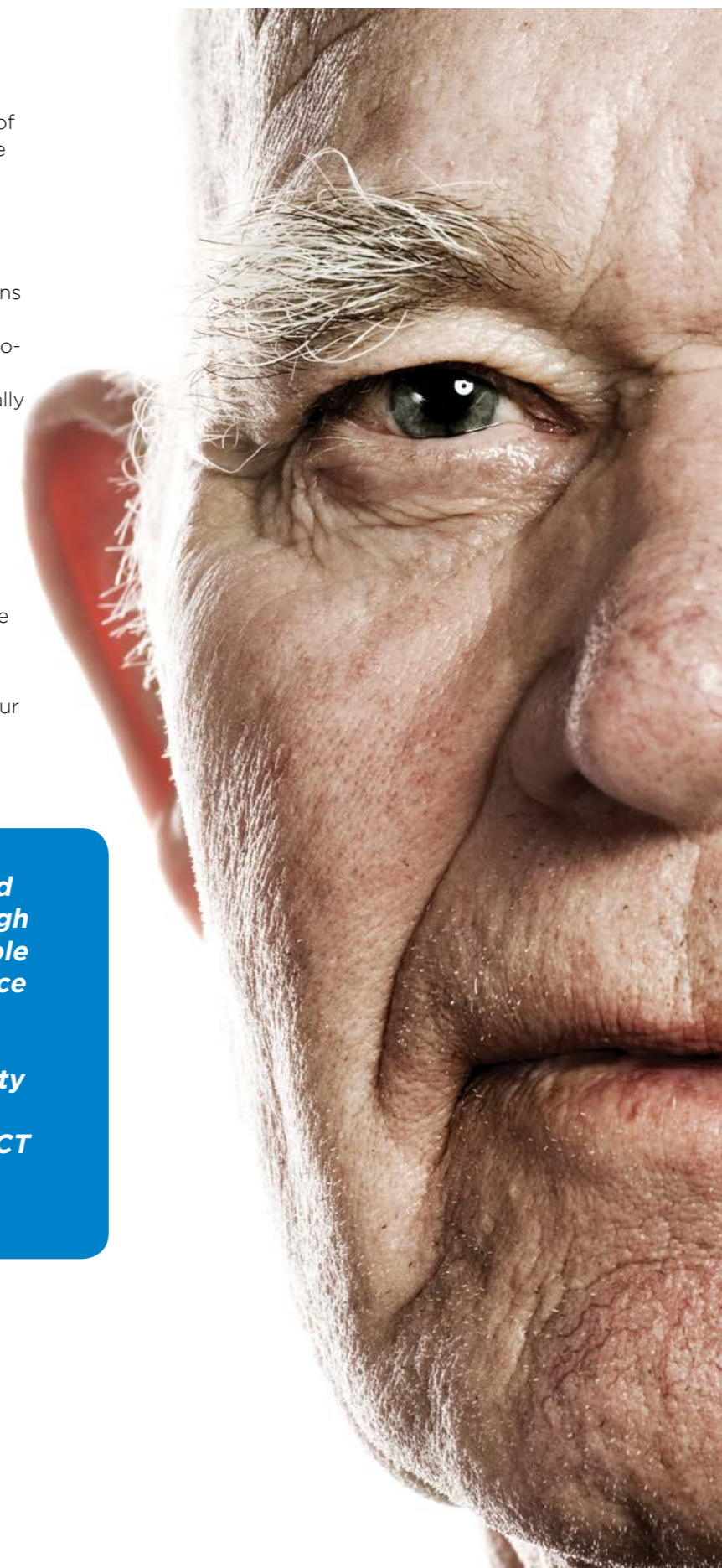
Elder financial abuse is about illegal or improper use of an older person's finances or property. It may include stealing, misappropriating money, forcing changes to a will or other legal documents, denying access to personal funds, forging signatures or fraudulently preparing and misusing a Power of Attorney.

Surveys tell us that in excess of 6% of older Canberrans have experienced elder abuse of all kinds. Abuse of older people is not selective and crosses gender, socio-economic, religious and cultural boundaries. Abuse is most likely to be inflicted by family members, especially an older person's adult children.

You can do the following to prevent Elder Abuse -

- Take care in who you appoint as your attorney. Ensure that you choose a person that is available, capable, proximate and trustworthy and free of conflict of interest.
- Think carefully and seek independent advice before signing any documents or providing others with money.
- Seek independent legal advice before changing your will.
- Keep PIN numbers private.

***The ACT Government's Elder Abuse Prevention Program aims to reduce and prevent incidents of elder abuse through community awareness raising, accessible information and referral systems, service response guidelines and staff training. The Program is coordinated by the Office for Ageing in the ACT Community Services Directorate. The Elder Abuse Prevention Network (EAPN) and the ACT Ministerial Advisory Council provide advice about this program.***





**PUBLIC TRUSTEE**  
FOR THE AUSTRALIAN CAPITAL TERRITORY

## FACT SHEETS

Our Fact Sheets can be found under "Publications" on our website at [www.publictrustee.act.gov.au](http://www.publictrustee.act.gov.au)

You'll find comprehensive information about a range of issues and services.

Our top four Fact Sheets have been translated into five different languages.



**OUR  
CUSTOMERS  
SAID...**

"The physical location of the Public Trustee for the ACT is most important to older folk who depend on public transport - ideally situated at present"

"Professional and competent, clear and comprehensive explanations, I feel confident that my wishes will be executed in accordance with the signed document"

"Very well presented, informative and clear"

"It was a nice surprise when my will was finished so quickly. I had expected I would have to come back to read and sign it!"

"Professional service, good advice, on time, easy access and well located in the city"

"An excellent presentation, who said succession law was dull!"

"Your staff were easy to talk to and explained everything in a manner I understood".

## WE ARE CHANGING...

In our quest for continuous improvement -

- We will soon be launching our online Unclaimed Money register and claims system.
- Our business system TACT is currently being upgraded to the latest version.
- We are the only Australian will-maker where our scanned Wills are accepted in evidence by our Supreme Court.
- GreaterGood, our own charitable foundation reached \$14.2M this year.
- We are installing a TTY phone for persons with a hearing disability to access our Official Visitors.
- Our Australian Equities Common Fund has been transferred from active to index management.

## CONTACTING US

<b>HOURS</b>	- 9.00am - 4:30pm (Mon - Fri)
<b>OFFICE</b>	- 221 London Crct, Canberra City ACT
<b>POST</b>	- PO Box 221, Civic Square ACT 2608
<b>PHONE</b>	- (02) 6207 9800
<b>FAX</b>	- (02) 6207 9811
<b>EMAIL</b>	- <a href="mailto:publictrustee@act.gov.au">publictrustee@act.gov.au</a>
<b>WEB</b>	- <a href="http://www.publictrustee.act.gov.au">www.publictrustee.act.gov.au</a>

### DISCLAIMER

The content of this newsletter is general information only and should not be relied upon as legal advice. You should contact a solicitor or the Public Trustee to obtain professional advice applicable to your particular issue and circumstances.