

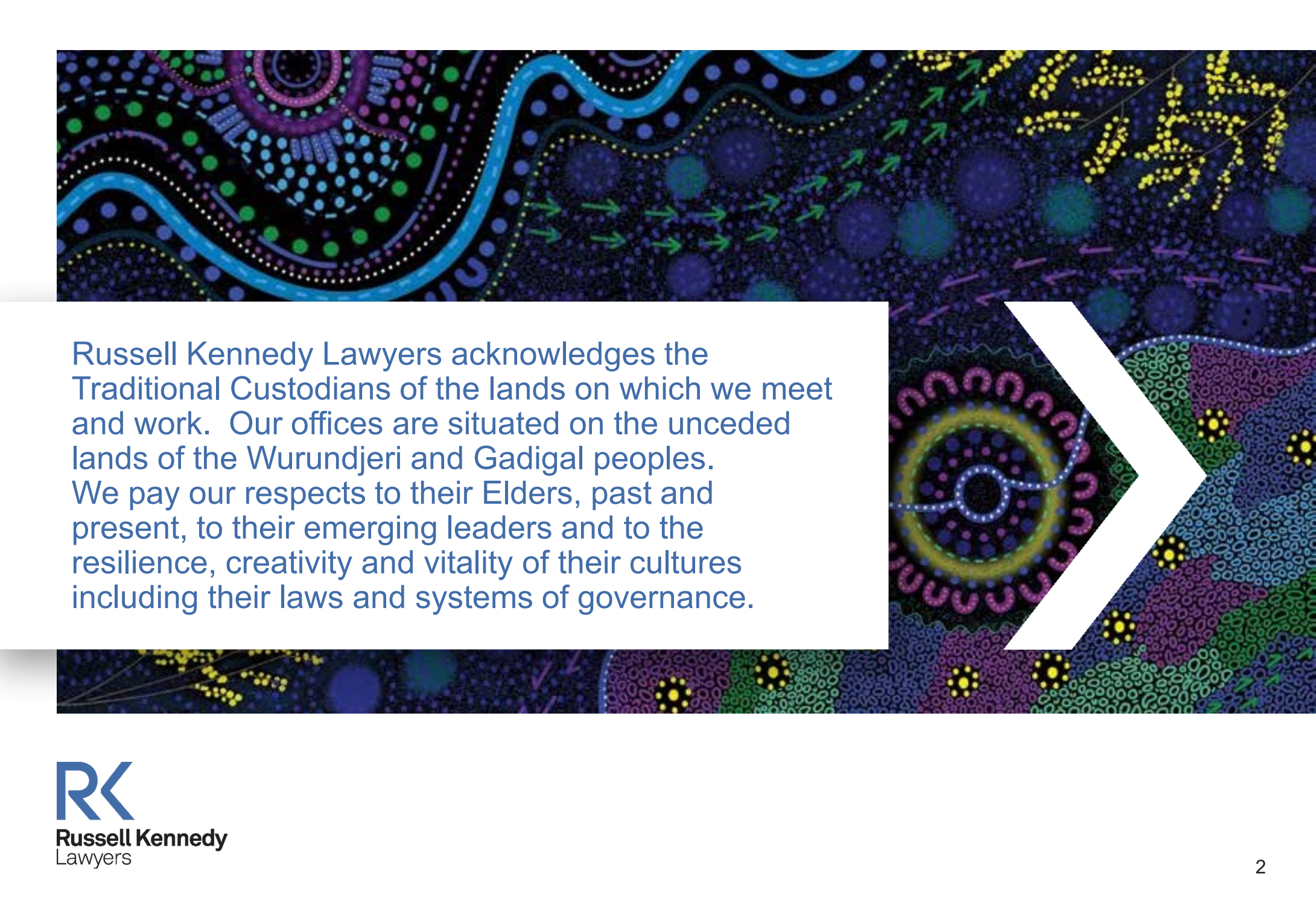
# Dealing with legal personal representatives and residents' payments in retirement villages

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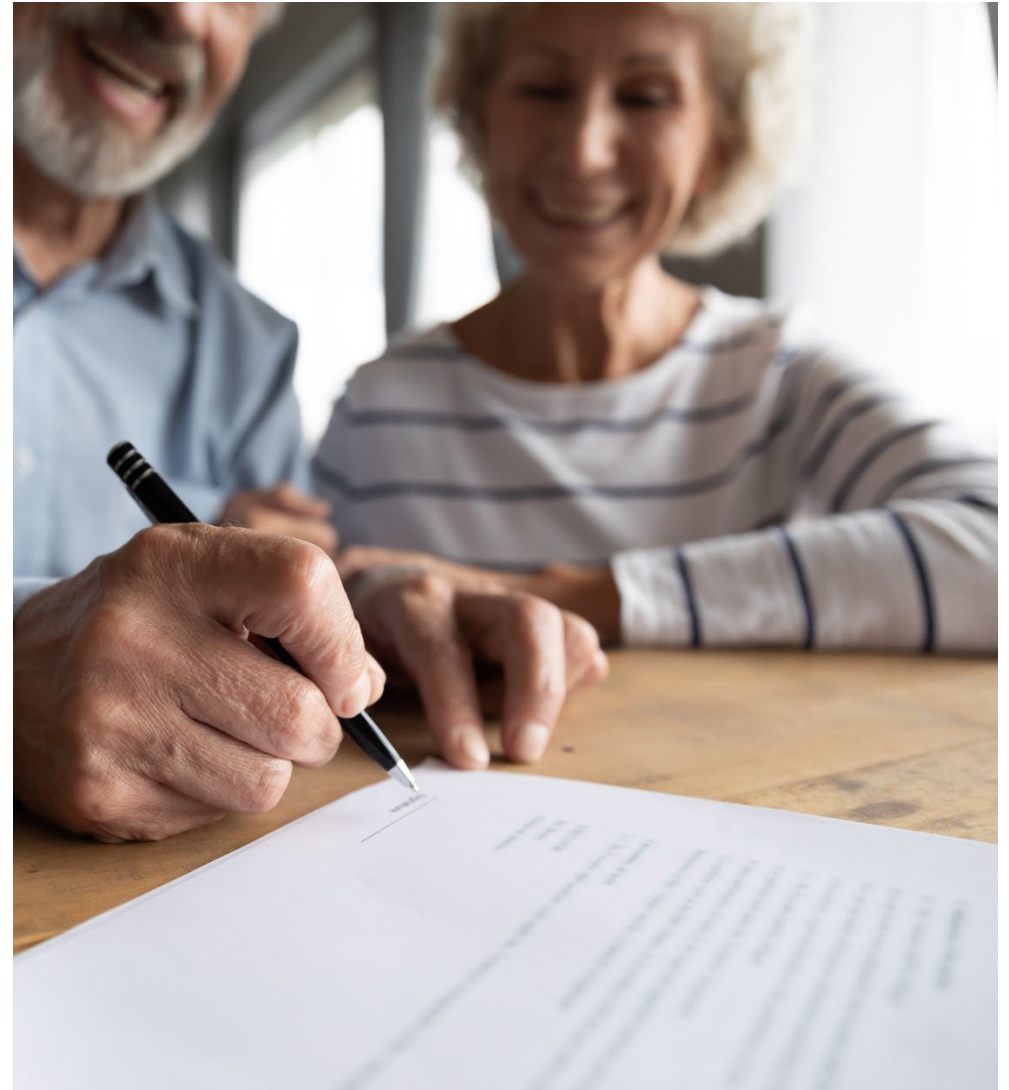


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# Introduction

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- Entry into resident agreements
- Exit payments
- Overview of different type of POAs
- Overview of Probate/LOA
- Practical issues in dealing with residents and their families during resident occupancy in relation to financial matters, additional services/lifestyle issues, and in dealing with exit payments



# Entering into residence contracts

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- **Disclosure**
  - must be made to the resident or their lawyer/conveyancer or POA
- **Residence contract**
  - must be signed by the resident or their POA
  - if POA, need to see the original or a certified copy of the POA to ensure that the person signing contract is authorised to sign the document as the resident's attorney



# Payment of exit entitlements

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- When do operators need to pay exit entitlements under the RV Legislation?
- **Victoria**
  - If 6 month rule applies, no later than 6 months after vacant possession
  - In all other cases on the earlier of 14 days after receipt of payment of the next ingoing contribution or 14 days after occupation by the next resident or as set out in the residence contract
- **NSW**
  - If registered interest holder and long term lease with at least 50% CG to resident – resident may apply for exit entitlement order within 6 months (metro) or 12 months (rural) of vacant possession if premises not sold and operator unreasonably delayed the sale
  - If non registered interest holder – payment due within maximum of 6 months of vacant possession

# Payment of exit entitlements (cont'd)

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## What information should you obtain before making any payment?

### If resident is deceased

- Most contracts state that payment will not be made until grant of probate or letters of administration produced

### If resident still with us

- Payment to the resident only, as directed by the resident or their attorney

### In all cases

- Need payment directions and bank details and need to verify bank details (so need to speak to the resident, their attorney or their lawyer/conveyancer)

# Terminology

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Will  
Executor/Administrator  
Beneficiary  
Probate/Letters of Administration  
Intestacy

Enduring Power of Attorney  
General Power of Attorney  
Principal  
Attorney  
Administrator  
Medical Treatment Decision Maker  
Guardian



# Types & Forms of Powers of Attorney (Victoria)

Note: some appointments under previous legislation may still apply if transitional provisions allow for it

DECISION / ROLE	DOCUMENT	POWERS
<b>Personal and/or financial</b> <i>Refer to document</i>	<b>Enduring power of attorney</b> <i>Powers of Attorney Act 2014 (Vic)</i>	Powers take effect immediately unless specified otherwise  <b>Exclusions: No longer includes medical treatment decisions.</b> But EPOAs made prior to 12 March 2018 with power to make medical decisions continue to have effect. Other usual exclusions apply, eg cannot vote, make a Will, make an ACD)
	<b>Supportive attorney</b> <i>Powers of Attorney Act 2014 (Vic)</i>	The consumer can appoint an eligible person who supports the consumer in making and giving effect to decisions that are specified in the appointment in relation to any personal or financial or other matters specified in the appointment  Only operates while the consumer retains capacity



# Victoria (continued)

DECISION / ROLE	DOCUMENT	POWERS
<p><b>Medical</b>  <i>Consumer can appoint OR it is automatic</i></p>	<p><b>Medical treatment decision-maker</b>  <i>Medical Treatment Planning and Decisions Act 2016 (Vic)</i></p>	<p><b>Appointed:</b> A consumer who has decision-making capacity may appoint another adult as their medical treatment decision maker to make “medical treatment decisions”. Anyone appointed with this function (eg EPOA or Medical Agent prior to 12 March 2018) will constitute the medical treatment decision-maker  <i>Note: the definition of “medical treatment” is much broader than it used to be and includes most things an aged care provider does. However, it does not include palliative care or restrictive practices</i></p> <p><b>Automatic appointment:</b> If no one is appointed, the relevant medical treatment decision maker is the first person listed in the hierarchy:</p> <ol style="list-style-type: none"> <li>1. A formally appointed medical treatment decision maker appointed (under Part 3 of the MTPD Act) note the adult must have capacity to appoint this person</li> <li>2. A guardian (as described above) with the power to make medical treatment decisions on behalf the person</li> <li>3. The first of the following persons who is in a ‘close and continuing relationship’ with the person:               <ol style="list-style-type: none"> <li>(a) The spouse of domestic partner of the person</li> <li>(b) The primary carer of the person</li> <li>(c) The first of the following, and if more than one, the oldest of the class of persons:                   <ol style="list-style-type: none"> <li>(i) An adult child of the person</li> <li>(ii) A parent of the person</li> <li>(iii) An adult sibling of the person</li> </ol> </li> </ol> </li> </ol>

## Victoria (continued)

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DECISION / ROLE	DOCUMENT	POWERS
<b>Medical</b>	<b>Support person</b> <i>Medical Treatment Planning and Decisions Act 2016 (Vic)</i>	A consumer who has decision-making capacity may appoint another person as their support person. The role of the support person is to support the consumer to make, communicate and give effect to their medical treatment decisions and to represent the interests of the person in respect of the consumer's medical treatment

# Victoria (appointed by VCAT)

DECISION / ROLE	DOCUMENT	POWERS
<b>Personal</b> <i>See scope of order</i>	<b>Guardian</b> <i>Guardianship and Administration Act 2019 (Vic)</i>	<p>Personal matters set out in the order, typically include:</p> <ul style="list-style-type: none"> <li>• Health care decisions</li> <li>• Accommodation decisions</li> <li>• Decisions about access to services</li> </ul> <p>VCAT can appoint Guardian/POA if:</p> <ul style="list-style-type: none"> <li>- there is no enduring power of attorney in place, or</li> <li>- an enduring power of attorney is in place, but it is deficient or inappropriate. Therefore, if an Attorney is not acting in the best interest of a consumer, ensure you document this and inform your manager as this evidence may be needed at VCAT</li> </ul> <p>If there is no one suitable to be appointed, someone from the Office of the Public Advocate may be appointed</p>
	<b>Supportive guardian</b> <i>Guardianship and Administration Act 2019 (Vic)</i>	<p>This enables a person to support a consumer with a disability to make their own decisions. In these circumstances the person will still make the final decision, however they will be supported to do so</p>

# New South Wales

DECISION / ROLE	DOCUMENT	POWERS
<b>Financial matters only</b>	<b>Enduring power of attorney</b> <i>Powers of Attorney Act 2003</i> (NSW)	The Principal can appoint someone to make legal or financial matters only <b>Not personal matters</b>
<b>Personal matters/ medical</b> <i>As per scope of document</i>	<b>Enduring Guardian</b> <i>Guardianship Act 1987</i> (NSW)	A Principal can appoint an Enduring Guardian to make decisions in relation to health care, personal services, carrying out medical treatment as per the scope of document. Includes, most relevantly: <ul style="list-style-type: none"><li>• where the Principal can live</li><li>• lifestyle services (eg additional services/hairdressing/activities)</li><li>• health care</li></ul>
<b>Medical</b> <i>NOT appointed</i>	<b>Person responsible</b> <i>Guardianship Act 1987</i> (NSW)	Not formally appointed  The person responsible can provide consent to medical or dental treatment when a care recipient is not capable of giving that consent. There is a hierarchy of people who can be the person responsible ie: <ol style="list-style-type: none"><li>1. Guardian</li><li>2. Spouse or partner</li><li>3. Carer</li><li>4. Relative or friend</li></ol>

## New South Wales (appointed by the TRIBUNAL)

DECISION / ROLE	DOCUMENT	POWERS
<b>Financial</b>	<b>Financial manager</b> <i>Guardianship Act 1987</i> (NSW)	The Tribunal can appoint a financial manager if the Principal has lost decision making capacity to appoint an Attorney. This person can make decisions in relation to financial matters eg: <ul style="list-style-type: none"><li>• paying bills</li><li>• buying and selling property</li></ul>
<b>Personal matters</b> <i>As per scope of order / medical</i>	<b>Guardian</b> <i>Guardianship Act 1987</i> (NSW)	The Tribunal can also appoint a guardian if the Principal has lost capacity to appoint one themselves. The Tribunal will determine the powers which can includes personal matters eg: <ul style="list-style-type: none"><li>• health</li><li>• lifestyle (eg additional services/hairdressing/activities)</li><li>• accommodation such as where the person lives</li></ul>

# Dealing with payments of deceased residents

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- Role of executor/administrator
- Grant of Probate/Letters of Administration



# Practical issues dealing with residents and their families

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Role of next of kin vs attorney/executor

At what stage of the process in an exit from the village do you need to see the POA/grant of probate?

Commencement of EPOA

Members of staff witnessing POAs

How to determine when someone has lost capacity

Executor or attorney directing funds be paid to their personal account

Disagreement between family members and attorneys

No grant of Probate or Letters of Administration – should you release funds to the family?

# Q&A - Your Russell Kennedy Contacts

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