

ENDURING GUARDIANS

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What is an Enduring Guardian?

An enduring guardian is someone who is empowered to make decisions for you on a range of lifestyle issues such as:

- where you live (such as a specific nursing home, or your own home);
- the health care you receive;
- other personal services you receive (eg podiatry, physiotherapy); and
- medical and dental treatment you will receive

in the event, and only for so long as, you are incapable of making those decisions yourself. This may occur, for example, if you are injured, have a stroke, or suffer from dementia or alzheimers. Before reaching this state, you can appoint an enduring guardian.

Your enduring guardian can only act on your behalf in this regard if you are unable to make those decisions yourself.

You can exclude any function of your guardian or your can add any function in relation to the management of your person.

An enduring guardian is not empowered to deal with your property or assets.

Why appoint an Enduring Guardian?

If you appoint an enduring guardian then it is clear to everyone else who you would want to make lifestyle and health decisions on your behalf and your wishes in relation to how those decisions should be made can also be recorded.

If you do not appoint an enduring guardian to make these decisions on your behalf, in the event that you are unable to make them yourself, then with respect to decisions about your **medical and dental** treatment only, the law provides that the "person responsible" for you can make those decisions. The "person responsible" for you is not necessarily your next of kin. If you have not appointed an enduring guardian, then the person responsible for you is:

- your spouse or de facto spouse (including same sex), if the relationship with your spouse is close and continuing and your spouse is not a person under guardianship (ie a person who has a guardian, presumably whose powers are activated because that person has lost capacity);
- if there is no such spouse or de facto spouse, a carer who does not receive remuneration (other than the carer's pension) for your care who is providing domestic support and services to you (or arranging for such support and services to be provided to you) or who provided this support and services (or arranged for the provision of this support and services) before you entered residential care; or
- if there is no carer, a relative or friend who has a close personal relationship with you.

A person will be a "close friend or relative" if the person maintains both a close personal relationship with you through frequent personal contact and has a personal interest in the your welfare and they do not receive remuneration (other than the carer's pension) for your care or have a financial interest in, any services performed in relation to your care.

In other words, unpaid carers have priority over relatives and friends and if there is no unpaid carer, then any relative or friend who is concerned about your welfare (and has a close personal relationship with you) can make medical decisions for you. A person who is the person responsible according to the hierarchy above, can only be skipped over in favour of the next person in the hierarchy, if they decline in writing to exercise their functions or a medical practitioner or other person qualified to give an expert opinion on the person's condition, certifies in writing that the priority person is not capable of carrying out those functions.

There are certain circumstances (such as where treatment is required urgently and the requirements of the legislation are met) in which treatment can be given without needing the consent of the person responsible.

In relation to other decisions that may need to be made for you, such as where you will live and day to day health and lifestyle decisions, some aged care accommodation providers require you to have an enduring guardian (whether it is someone you have appointed or who has been appointed by the Guardianship Tribunal) so that it is clear who has authority in relation to you.

Can I appoint more than one person to be my guardian?

You can appoint more than one person to be your guardian and you can appoint them to act jointly, severally or jointly and severally.

If you appoint them jointly, then both or all of your guardians must make decisions together. This can cause problems and delays if one or more person is unavailable at the time a decision needs to be made or if your guardians can not agree.

Appointing guardians severally is the most flexible type of appointment but involves trusting your guardians to exercise the right judgment about when consultation with the other guardians is necessary or not.

If your guardians are appointed to act jointly and severally, then they can act jointly or any one of them can act alone, without necessarily consulting with the others.

You can appoint an alternative guardian to act in the event that your first choice of guardian has died, resigned or has become incapacitated. If you do this, it will be necessary for your alternative guardian to prove that your first appointed guardian has died, resigned or become incapacitated. This can cause delays and great inconvenience in the management of your affairs. An alternative guardian may also of course be needed to act in other circumstances (for example, if your first choice of guardian is hiking overseas).

If you are concerned about this, then you might like to consider:

- making separate appointments in separate documents; or
- appointing your first choice and alternative guardians to act jointly and severally.

In doing so, you would be trusting your second choice of guardian to only act in the event that your first choice of guardian is unavailable.

If you do appoint an alternative guardian and you have appointed more than one primary guardian, then the alternative guardian will have the power to act if any one of your primary guardians has died or resigned or during any incapacity of a primary guardian (in conjunction with your other primary guardians) and not only when all of the primary guardians have died, resigned or become incapacitated.

You can leave guidelines or non-binding instructions about the order or circumstances in which you would like people to act as your guardian, in a separate document or memorandum of wishes.

Can I control how my guardian makes decisions about me?

You can include directions about how your guardian is to make decisions about you (eg a direction that your guardian must consult a particular person before making a decision or that you do not wish to receive a particular type of treatment). You should consider any conditions or restrictions you wish to impose very carefully, to ensure they will not cause great inconvenience in the management of your affairs, particularly if decisions need to be made quickly.

What are my enduring guardian's duties?

When acting as your enduring guardian, your enduring guardian must follow the principles set out in s4 of the Guardianship Act (NSW), which are as follows:

- (a) your welfare and interests should be given paramount consideration,
- (b) your freedom of decision and freedom of action should be restricted as little as possible,
- (c) you should be encouraged, as far as possible, to live a normal life in the community,
- (d) your views in relation to the exercise of those functions should be taken into consideration,
- (e) the importance of preserving your family relationships and your cultural and linguistic environments should be recognised,
- (f) you should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs; and
- (g) you should be protected from neglect, abuse and exploitation.

Are there any treatments or procedures my enduring guardian cannot consent to?

Your enduring guardian can not consent to special treatment which includes, at the time this information was prepared, the following treatments, amongst others:

- Sterilisation;
- Termination of pregnancy; and
- New treatment that has not yet gained the support of a substantial number of doctors or dentists specialising in the area.

These restrictions are set by legislation which may change over time.

The guardian cannot consent to your having major nor minor medical or dental treatment which you indicate or have in the past indicated, that you object to having.

The consent of the Guardianship Division of the NSW Civil and Administrative Tribunal ("NCAT") is required to administer these treatments. If it becomes necessary for the person you have appointed to act as your Guardian, your Guardian should take advice or contact the Guardianship Tribunal for information about the parameters of their powers and functions.

An application can be made by a Guardian to the Guardianship Division of NCAT for directions about how to exercise his or her functions as a Guardian.

Here is a link to the Division's website:

<http://www.ncat.nsw.gov.au/Pages/guardianship/guardianship>

Can my guardian access information about me?

For the purpose of exercising a function as your guardian, the guardian has the same right of access to personal information as you have.

Can I revoke the appointment of my enduring guardian?

Provided you have not lost mental capacity, you can revoke the appointment of your enduring guardian. You must do so in writing, using the prescribed form. The form must be signed by you or on your behalf before an eligible witness (such as a solicitor). Written notice of the revocation must be given to the person whose appointment you are revoking but you do not need to give reasons for your decision.

Your appointment of enduring guardian will also be revoked if you marry a person other than the person you have appointed to be your guardian, after the date of the appointment. Note however, that divorce or separation does not revoke an appointment of enduring guardian.

Can my guardian resign?

If you are not in need of a guardian, then your guardian can resign by giving you a written notice that is in the prescribed form and signed before an eligible witness. If you need a guardian, then the guardian can only resign with the consent of the Guardianship Division.

What if there is a dispute about how my guardian is exercising his or her functions?

If there is a dispute between your guardians or if someone else is unhappy with how your guardian is exercising his or her functions, an application can be made to either the Supreme Court of New South Wales or the Guardianship Division of NCAT.

Will my appointment of my enduring guardian operate in other states or countries?

If you move or travel from New South Wales, it is best to make an appointment of a guardian that complies with the law of the place you are in.

How do I make an appointment of an Enduring Guardian?

We recommend that you see a solicitor to prepare an Appointment of an Enduring Guardian and advise you about it. In any event, a solicitor will need to witness your signature and sign a certificate that accompanies the document, to make the appointment of your attorney effective. Your Guardian will also need to sign the document, to accept their appointment as your Guardian, in the presence of a solicitor (or another eligible witness) who must also sign a certificate.

The certificates must state that you (or the guardian) appeared to understand the effect of the appointment and that the document was signed in the solicitor's presence.

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