



Planning Ahead . . . enduring guardianship

A guide to assist in planning for your future

The information in this pamphlet is to help you plan ahead for personal or lifestyle decisions. It is not legal advice.

What is an enduring guardian?

An enduring guardian is someone you legally appoint to make personal or lifestyle decisions for you when you are not capable of doing this for yourself. You choose which decisions you want your enduring guardian to make. These are called functions. You can direct your enduring guardian on how to carry out the functions.

Why appoint an enduring guardian?

We all prefer to decide for ourselves where we live and what medical treatment and services we have. Unfortunately this is not always possible. Every day people are involved in accidents or become sick. Sometimes this can lead to them being unable to make decisions for themselves.

By appointing an enduring guardian you choose who you want to make decisions for you if you lose the capacity to do this for yourself.

Who can appoint an enduring guardian?

If you are over 18 years, you can appoint one or more people to be your enduring guardian(s). At the time you appoint an enduring guardian, you must have the mental capacity to understand what you are doing.

Who can be an enduring guardian?

The person you appoint as your enduring guardian must be:

- at least 18 years old
- someone you trust to make decisions in your best interests.

The enduring guardian cannot be a person who, at the time of appointment:

- provides medical treatment or care to you on a professional basis;
or
- provides accommodation services or support services for daily living on a professional basis; or
- is a relative of one of the above.

How many enduring guardians can I appoint?

You can appoint more than one enduring guardian. When appointing more than one enduring guardian, you should choose people who can cooperate with each other and who you trust to work together in your best interests. It is also important to consider their availability to make decisions on your behalf.

You can appoint your enduring guardians to act:

- jointly and severally (this means that the enduring guardians can make decisions together or separately),
- severally (this means that any one of the enduring guardians can make decisions independently of the other enduring guardian),
- or jointly (the enduring guardians must agree on all decisions).

What if one of my enduring guardians dies or cannot continue for some reason?

Your appointment of enduring guardians may be affected if one of your enduring guardians dies or cannot continue in their role. This depends on how you appointed the enduring guardians. If you appointed them to act jointly and one of them is no longer willing or able to carry out their duties, then this will automatically end the appointment of enduring guardians. If you do not want this to happen, you will need to make it clear in the appointment form that the remaining guardians can keep making decisions for you even if one of the original guardians dies, resigns or becomes incapacitated.

However, if you appointed your enduring guardians to act jointly and severally or severally then the appointment of the enduring guardians will continue, even when one of them can no longer act. The remaining enduring guardians can keep making decisions for you.

What happens if I only have one enduring guardian and they cannot continue?

If the person you have appointed dies, resigns or becomes incapacitated, you can appoint someone else to be your enduring guardian. If you do not have the mental competence to do this, the Guardianship Tribunal can, in limited circumstances, order another person to be appointed as your enduring guardian. Someone will need to lodge an application on your behalf.

What is an alternative enduring guardian?

You can appoint an alternative enduring guardian who can act only if the original enduring guardian/s dies, resigns or becomes incapacitated.

What principles guide an enduring guardian?

Your enduring guardian must act within the principles of the *Guardianship Act 1987*, in your best interests and within the law. You cannot give your enduring guardian a function or a direction which would involve them in an unlawful act.

What kind of decisions can an enduring guardian make?

You can give your enduring guardian as many or as few functions as you like. The appointment form has a list of functions and you can delete the functions you do not want your enduring guardian to have and add others if you wish. For example, you can give them the power to decide about your health care but not where you live.

You may give the enduring guardian directions about how to exercise the decision making functions you give them. For example, you can direct your enduring guardian to consult with a particular close friend before making a decision. If your enduring guardian has a health care function, they will be able to access your medical records to help make decisions for you.

What decisions can't an enduring guardian make?

An enduring guardian cannot consent to anything unlawful and cannot:

- make a will for you,
- vote on your behalf,
- consent to marriage,
- manage your finances, or
- override your objections, if any, to medical treatment.

An application must be made to the Guardianship Tribunal to authorise medical treatment overriding your objections. Only the Tribunal can consent to certain 'special' medical treatments.

If you strongly object to the enduring guardian's decisions, you or someone on your behalf can ask the Guardianship Tribunal to review the enduring guardianship appointment.

When does an enduring guardianship appointment start?

The appointment of your enduring guardian takes effect only if you become unable to make your own personal or lifestyle decisions. Your enduring guardian may wish to seek the opinion of a medical practitioner about your capacity to make decisions before acting on your behalf.

When does an enduring guardianship appointment end?

An enduring guardianship appointment ends:

- when you die
- if you revoke the appointment
- if you marry after appointing an enduring guardian. On marriage the appointment is automatically revoked or cancelled. If you wish to reappoint the enduring guardian, you need to complete a new form reappointing the person.

- if one of the guardians dies, resigns or becomes incapacitated and they were appointed jointly unless you provide otherwise in the form.
- if the Guardianship Tribunal revokes the appointment of enduring guardian. If the Tribunal makes a guardianship order that will suspend any appointment of an enduring guardian.

How do I appoint an enduring guardian?

STEP 1

You need to discuss the appointment with your chosen enduring guardian and make sure they are willing to take on this responsibility if you were no longer capable of making decisions for yourself. You should discuss the functions in detail and ensure that your guardian clearly understands your wishes.

STEP 2

You may also wish to discuss the appointment with family or other significant people in your life.

STEP 3

You can use the attached form to appoint one enduring guardian or more than one if you want your enduring guardians to have the same functions. However, if you want your enduring guardians to have different functions and to act separately, you should fill out a separate form for each proposed enduring guardian.

STEP 4

Make sure the form is signed by:

- you or an eligible signer on your behalf
- and**
- the enduring guardian(s)
- and**
- the witness for each signature.

Who can be an eligible signer or witness?

If you are competent to make an enduring guardianship appointment but you are not physically able to sign the form, an eligible signer can sign for you. An eligible signer must be over 18 and cannot be the enduring guardian or a witness. You must be present when the eligible signer signs on your behalf.

A witness must be a NSW barrister or solicitor with a practising certificate, a registrar of the Local Court, or an interstate legal practitioner. Every signature on the form must be witnessed. The different signatures can be witnessed by different people at different times and places. For example, your signature can be witnessed in NSW and the enduring guardian's signature can be witnessed in another state or territory by a different witness.

What should I do with the appointment?

It is a good idea to keep the appointment form in a safe place. Tell someone else where it is. Give a copy to your enduring guardian. You may wish to give copies to significant people in your life (eg your doctor). You **do not** have to send the enduring guardianship form to the Guardianship Tribunal.

How do I revoke my enduring guardianship appointment?

While you are capable of making your own decisions, you can revoke the appointment of an enduring guardian. To do this you need to complete a *Revocation of Appointment of Enduring Guardian* form available from the Guardianship Tribunal or a solicitor. This form will also need to be witnessed by an eligible witness. You have to advise the enduring guardian in writing that their appointment has been revoked.

You can appoint a new person as your enduring guardian, or change the functions or directions given to your enduring guardian. You will need to complete a new form of appointment to achieve any of these things.

Only the Guardianship Tribunal can make changes to the appointment if you have lost the capacity to do this for yourself.

Can an interstate enduring guardianship appointment be used in NSW?

Yes.

If an enduring guardianship appointment was made in another Australian state or territory then it is automatically recognised in NSW. This does not apply to enduring guardianship appointments which are made overseas.

Can a NSW enduring guardianship appointment be used interstate or overseas?

If you want your enduring guardianship appointment to be used in another state or overseas, you should make enquiries in that state or country. Every state and country has different laws about enduring guardianship.

What if someone is worried about what my enduring guardian is doing?

Anyone with a genuine concern for your welfare can apply to the Guardianship Tribunal for a review of the appointment if they feel that your enduring guardian is not making appropriate decisions on your behalf. The Tribunal can revoke the appointment or confirm it. It may also change the functions in the appointment or make a guardianship order.

The Tribunal does not supervise enduring guardians. It will act only if it receives an application from a concerned person and receives information which leads it to review the enduring guardian appointment.

Where can I get legal assistance?

- Community legal centres – some will assist you for free or at a low cost.
- Private solicitors – can draw up forms for the appointment of an enduring guardian. Private solicitors charge for their services.
- Registrar of the Local Court – can witness the appointment of an enduring guardian for free.

THE FORM ATTACHED TO THIS GUIDE SHOULD NOT BE RETURNED TO THE GUARDIANSHIP TRIBUNAL.

After the form is completed there is no requirement to formally lodge it anywhere. However, it is a good idea to keep the completed appointment form in a safe place.

Tell someone else where it is. Give a copy to your appointed enduring guardian(s).

More Information

Guardianship Tribunal

Website: www.gt.nsw.gov.au

Telephone: (02) 9556 7600

Toll free 1800 463 928

TTY (telephone typewriter) (02) 9556 7634

Fax: (02) 9555 9049

Email: gt@gt.nsw.gov.au

Address: Level 3, 2a Rowntree Street, Balmain 2041

Postal address: Locked Bag 9, Balmain 2041