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# Enduring Guardianship

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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.

Under the *Guardianship Act*, you can appoint an **enduring guardian** to make decisions for you if you lose the capacity to do this for yourself.

## What is an enduring guardian?

An enduring guardian is someone you choose to make personal or lifestyle decisions on your behalf 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.

## Who can appoint an enduring guardian?

If you are over 18 years, you can appoint one or more people to be your enduring guardian. At the time you appoint an enduring guardian, you must have the 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 appointed 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.

## What sort of decisions can an enduring guardian make?

You can give your enduring guardian as many or as few functions as you like. 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 on 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 see 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.

If at any time decisions are made by your enduring guardian to which you strongly object, the matter can be brought to the Guardianship Tribunal.

An application must be made to the Guardianship Tribunal to authorise medical treatment overriding your objections. Also, only the Tribunal can consent to certain “special” medical treatments.

### What principles guide an enduring guardian?

Your enduring guardian must act within the principles of the *Guardianship Act*, 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.

### How many guardians can I appoint?

You can appoint one or more persons as enduring guardian. If you appoint more than one enduring guardian, you can direct them to act jointly or separately (severally).

### What are joint and alternative enduring guardians?

You can appoint enduring guardians to act **jointly** (the enduring guardians must agree on all decisions), **severally** (each enduring guardian can make decisions separately from the others), or **jointly and severally** (the enduring guardians can act together or separately).

You can choose to have the remaining joint enduring guardian(s) continue even though one or more of the others die, resign or become incapacitated. The Appointment of Enduring Guardian form provides an option to allow for this in Section 1c. If you do not choose this option, the enduring guardianship will end automatically when one of the joint enduring guardians dies, resigns or becomes incapacitated.

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

## 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 need to complete the attached form or a document containing the same information. The form has to be signed by:

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

### Who can be an eligible signer or witness?

If you are competent to make an enduring guardianship application but you are not 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, a NSW solicitor, 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.

### **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).

### **When does it take effect?**

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.

**If there is any doubt about your capacity to make decisions, a medical practitioner may have to assess your capacity.**

### **Can I change my mind?**

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. 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.

### **What happens if I get married?**

If you marry after appointing an enduring guardian, the appointment is automatically revoked or cancelled. If you wish to reappoint the enduring guardian, you need to complete a new application form reappointing that person.

### **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 or receives information which leads it to review the enduring guardian appointment.

### **What happens if my enduring guardian cannot continue?**

If the person you have appointed dies, resigns or becomes incapacitated, the Guardianship Tribunal can, in limited circumstances, order another person to be appointed as enduring guardian on your behalf. Someone will need to lodge an application on your behalf.

### **When does an enduring guardianship end?**

Enduring guardianship ends when you die, or when you revoke the appointment. A joint enduring guardianship will also end if one of the guardians dies, resigns or becomes incapacitated unless you provide otherwise in the form. An enduring guardianship appointment is suspended if the Guardianship Tribunal makes a guardianship order. The Tribunal may revoke the appointment.

### **Where can I get legal assistance?**

- Community legal centres - some

will assist you for free or at 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.

### **Where can I get more copies?**

#### **Guardianship Tribunal**

**Website:** <http://www.gt.nsw.gov.au>

**Telephone:** (02) 9555 8500

Tollfree 1800 463 928

TTY (02) 9552 8534

**Postal Add:** Locked Bag 9, Balmain 2041

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**Please note that this is a summary and it is not a detailed statement of the law. You should obtain legal advice if you have any questions.**

With Compliments  
**NRG Legal**

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Partner  
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