



## Enduring Guardian

### 1. What is an Enduring Guardian?

An Enduring Guardian is a person appointed by you who can make decisions for you in areas such as accommodation, health and services, if you lose the capacity to make your own decisions at some time in the future. An Enduring Guardian cannot make decisions about your money or assets. You can make an **Enduring Power of Attorney** to appoint someone to manage your financial affairs.

The appointment of your Enduring Guardian takes effect only if you lose capacity and become unable to make your own medical or lifestyle decisions.

In some cases it will be clear when you have lost capacity and are unable to make decisions for yourself, for example, in cases of severe illness or accident. In other cases the decision about whether you have lost capacity to make your own decisions is less clear. For example, if you have dementia your decision-making capacity may fluctuate. If there is concern or disagreement over your capacity to make your own decisions, the *Guardianship Act 1987* (NSW) states that a medical certificate may be needed to establish whether your Enduring Guardian can exercise their authority.

### 2. Who can appoint an Enduring Guardian?

You can appoint an Enduring Guardian for yourself if you are an adult (over 18) and you have capacity.

To appoint an Enduring Guardian you need to understand the nature and effect of the Enduring Guardianship document at the time it is made. In legal terms this means that you have 'capacity' and are able to understand that you are appointing someone to make medical, health and lifestyle decisions for you, in case you lose capacity to make your own decisions in these areas.

### 3. Who can I choose as my Enduring Guardian?

The person you appoint as your Enduring Guardian should understand their responsibilities as a substitute decision maker for you, and be someone you trust to be able to take into account your views and previous lifestyle choices, and be able to make decisions in your best interests.

You need to carefully choose your Enduring Guardian taking into account the person's willingness to take on the role, their availability, age and health. Other things you should consider when choosing your Enduring Guardian are:

- (a) What is their ability to make decisions in potentially difficult and emotional circumstances?
- (b) How well does the person understand your needs, wishes, values and beliefs?
- (c) How easy will it be to contact the person when a decision needs to be made?



A person is not eligible to be appointed as your Enduring Guardian if they are involved in a professional or administrative capacity in providing any of the following services to you for a fee:

- (d) Medical services or cares for you in a professional capacity.
- (e) Accommodation.
- (f) Any other services to support your daily living activities.

It also excludes someone who is relative of a person providing these services. If someone receives the carers pension only, they can be appointed as your Enduring Guardian.

The person you appoint as your Enduring Guardian must agree to take on the role and must sign the appointment document in the presence of a lawyer, or chamber magistrate. Therefore, make sure you discuss your intention to appoint that person, and what it is likely to involve, before making the appointment.

#### 4. Can I appoint more than one Enduring Guardian?

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. If more than one is to be appointed, you need to specify whether the Enduring Guardians are to act:

(a) **Jointly**

This means that your Enduring Guardians have the same functions or decision-making areas. In making decisions on your behalf they must always agree and act together.

- (b) It is important to think about what you would like to happen if one of the joint Enduring Guardians dies, resigns or becomes incapacitated. If you want the other Enduring Guardian to continue to have their decision-making authority, then you must state this on the form. If you do not specify this, then the appointment of the remaining Enduring Guardian ends.

(c) **Severally**

Appointing severally means that your Enduring Guardians can make decisions without needing to agree and act together.

(d) **Jointly and Severally**

This means the Enduring Guardians have the same functions or decision-making areas and can act either together or independently in making decisions on your behalf.

#### 5. Can I appoint an Alternative Enduring Guardian?

You may appoint an alternative Enduring Guardian. Only one alternative Enduring Guardian can be appointed. If you do, the alternative Enduring Guardian will only have authority to act if the original Enduring Guardian dies, resigns or becomes incapacitated.

If your Enduring Guardian dies, resigns or becomes incapacitated and you have not appointed an alternative Enduring Guardian, the Guardianship Division, NSW Civil & Administrative Tribunal may, upon application, appoint a person to be your Guardian. A person who can be considered as guardian under the *Guardianship Act 1987* (NSW) will be



someone who, in the opinion of the Tribunal, has a genuine concern for your welfare, a close personal relationship with you and is willing and capable of acting as your guardian. If there is no-one to take on this role, then the Public Guardian will be appointed as last resort. This will only occur if decision making is required and cannot be done informally with other supports.

The Guardianship Division, NSW Civil & Administrative Tribunal may appoint an alternate guardian for a limited time if there is a genuine need, and if an application is made from someone who has a genuine concern for your health and welfare.

## 6. What decisions can my Enduring Guardian make?

Your Enduring Guardian can only make medical, health and lifestyle decisions on your behalf. In appointing an Enduring Guardian you are appointing a 'substitute decision maker' and the decision areas you nominate for your Enduring Guardian to make on your behalf are called 'functions'. You are able to choose the functions or decision making areas that you give to your Enduring Guardian.

The most common decision making areas or functions for an Enduring Guardian are:

- (a) **Accommodation** – to decide where you live: respite care, aged care facility or hospital.
- (b) **Health Care** – to decide what health care you receive. This function gives authority to your Enduring Guardian to choose or change your doctors (or other health care professionals) and make decisions about end of life treatment such as palliative care.
- (c) **Services** – to decide what personal services such as attendant care, domestic support, recreational services you should have to support and assist you.
- (d) **Consent to medical and dental treatment** – to give or withhold consent to medical and dental treatment on your behalf.

It is not possible for your Enduring Guardian to consent to medical treatment or dental treatment on your behalf when you object to that treatment.

Your Enduring Guardian cannot consent to anything unlawful and cannot:

- (a) Make a will for you; or
- (b) Vote on your behalf; or
- (c) Consent to marriage; or
- (d) Manage your finances; or
- (e) Override your objections to medical treatment. (An application must be made to the Guardianship Division, NSW Civil & Administrative Tribunal to authorise medical treatment overriding your objections.)

## 7. What guides the decision making of my Enduring Guardian?

Your Enduring Guardian must act within the principles of the *Guardianship Act 1987* (NSW) which sets out principles a guardian needs to observe when acting as your guardian, such as:

- (a) your welfare and interest are paramount;
- (b) your freedom to decide and act for yourself should be restricted as little as possible;



- (c) your views should be taken into account;
- (d) you should be encouraged to live a normal life and be self-reliant;

These principles aim to promote your independence and choice as well as ensuring you are cared for and protected.

## 8. What directives can I give my Enduring Guardian?

You can direct your Enduring Guardian as to how they should exercise their decision-making authority in the functions you have given them. For example you may direct them to seek advice from particular authorities before they can make a decision. If the directions are made as part of the witnessed appointment and are relevant to the decision that needs to be made, they are considered binding directions.

You can also limit the authority of your Enduring Guardian by specifying the function that you do not wish them to have.

There is an important difference between identifying the decision-making areas you wish to give your Enduring Guardian and setting out a list of specific decisions you would like your Enduring Guardian to make. If you give your Enduring Guardian directions or set limits they are legally binding and remove flexibility from their decision-making process this may restrict them from considering all options when making a decision.

## 9. Does anyone supervise my Enduring Guardian?

Your Enduring Guardian and their decision-making role is not subject to supervision and there is no requirement that the Enduring Guardian report on his or her role in making decisions on your behalf.

Any person who has a genuine concern for your welfare can request the Guardianship Division, NSW Civil & Administrative Tribunal review the appointment of your Enduring Guardian. In reviewing the appointment of an Enduring Guardian, the Tribunal may revoke or confirm the appointment, or vary the functions of the appointed Enduring Guardian. If the Tribunal decides to revoke the appointment of your Enduring Guardian, it can appoint a different guardian for a limited time under a guardianship order.

Only the Guardianship Division, NSW Civil & Administrative Tribunal can make changes to the appointment of your Enduring Guardian if you have lost capacity

## 10. When does my Enduring Guardianship appointment end?

An Enduring Guardianship appointment ends:

- (a) When you die.
- (b) If you revoke the appointment.
- (c) If you marry after appointing an Enduring Guardian, unless you marry the 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.
- (d) If one of the guardians dies, resigns or becomes incapacitated (i.e. cannot continue with the appointment) and they were appointed jointly unless you provide otherwise in the appointment document.
- (e) If the Guardianship Division, NSW Civil & Administrative Tribunal revokes the appointment of the Enduring Guardian.



(f) If the Tribunal makes a guardianship order which suspends any appointment of an Enduring Guardian.

## 11. Can I revoke (cancel) my Enduring Guardianship appointment?

While you have legal capacity, 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, otherwise the revocation is ineffective.

Only the Guardianship Division, NSW Civil & Administrative Tribunal can make changes to your Enduring Guardianship appointment if you have lost the capacity to do this for yourself.

## 12. What happens if my Enduring Guardian dies, becomes incapacitated or wants to resign?

If the Enduring Guardian you have appointed dies, resigns, becomes incapacitated or can no longer continue in this role, if you have appointed an alternative Enduring Guardian, then that person's appointment takes effect. If you have not appointed an alternative Enduring Guardian, you can make a new Enduring Guardianship appointment and appoint someone else to be your Enduring Guardian.

If you no longer have mental capacity, the Guardianship Division, NSW Civil & Administrative Tribunal can order another person to be appointed as your Enduring Guardian. An application must be made to the Tribunal for this to be done.

## 13. Where should I keep my Enduring Guardian form of appointment?

While there is no requirement to register your Enduring Guardianship document, your Enduring Guardianship form is an important legal document. However, it is only of use if it is able to be located when required. The original Enduring Guardianship form should be stored in a safe place, possibly where you keep your other legal documents such as your Will and Enduring Power of Attorney.

It is important that your Enduring Guardian has a copy of the form of appointment. Where possible this should be a certified copy. Your Enduring Guardian should know where to find the original form of appointment as they may need to produce evidence of the appointment.

***If you wish to discuss any of the matters addressed above, or require more information, please feel free to contact us on (02) 4731 5899 or email us at [willsstates@batemanbattersby.com.au](mailto:willsstates@batemanbattersby.com.au)***