

THE GUARDIANSHIP TRIBUNAL

Presented for
Law Society
of NSW

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President
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BACKGROUND TO THE GUARDIANSHIP TRIBUNAL

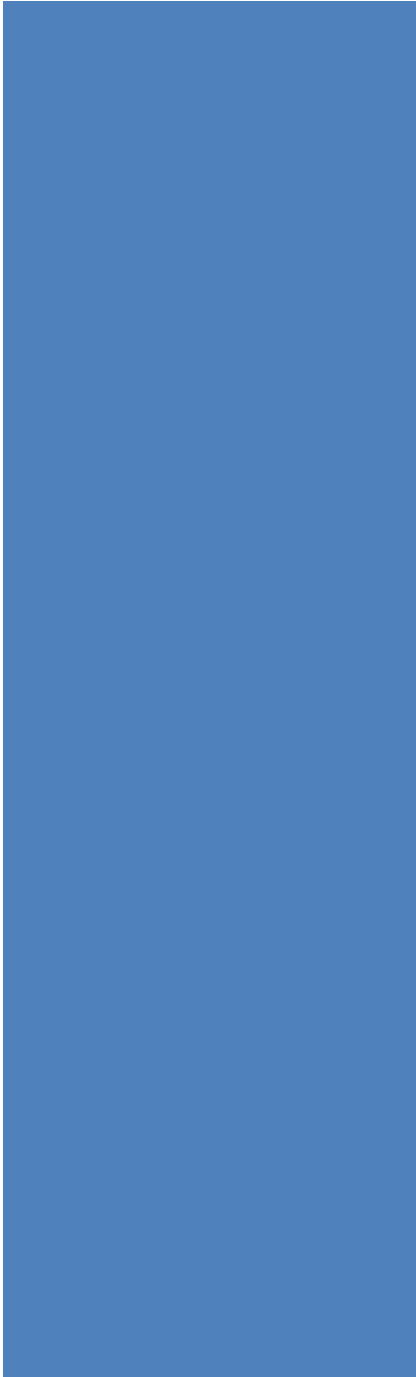
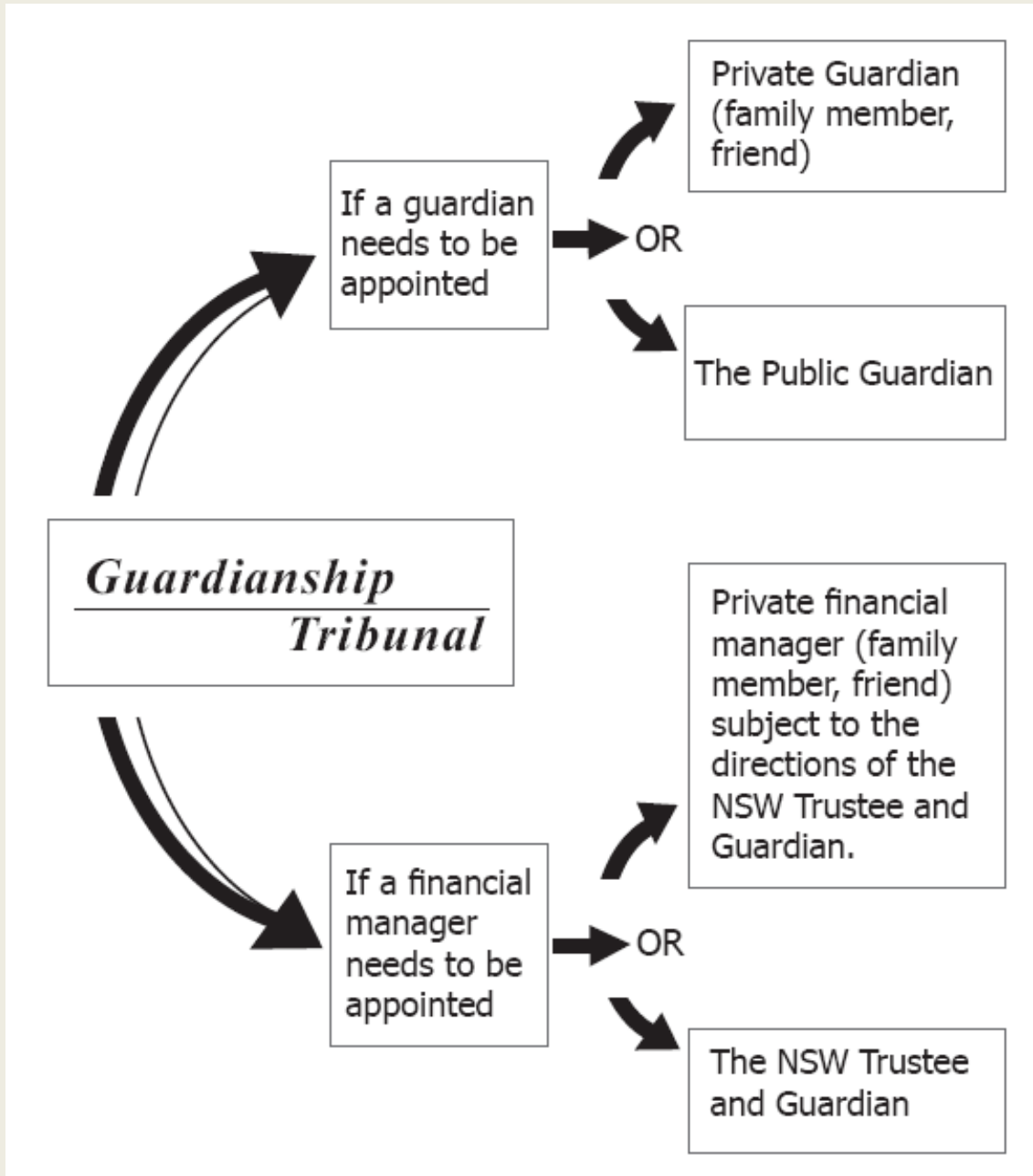
- A specialist disability Tribunal
- Exercising a protective jurisdiction (parens patriae)
- Created by statute – Guardianship Act 1987, Guardianship Regulation 2010
- Located at Balmain but hearings are held across NSW.
- Average of 6 Tribunals per day
- 92 part time Tribunal Members
- 2 full time Tribunal Members – President and Deputy President.
- To form part of NCAT January 2014

BACKGROUND TO THE GUARDIANSHIP TRIBUNAL

- The Tribunal appoints substitute decision makers for adults with a decision-making incapacity.
- A guardian for personal lifestyle decisions.
- A financial manager for financial/legal decisions.
- The Tribunal can also review enduring guardianship appointment and enduring powers of attorney.
- The Tribunal can also:
 - Consent to medical treatment
 - Consent to special medical treatment (e.g. sterilisation)
 - Approve clinical trials

BACKGROUND TO THE GUARDIANSHIP TRIBUNAL

- Most Tribunals sit as three members:
 1. A legal member - barrister or solicitor of 7 years standing.
 2. A professional member - doctor, psychologist, social worker with expertise in the treatment of adults with disabilities.
 3. A community member - someone with personal or familial experience with people with disabilities.

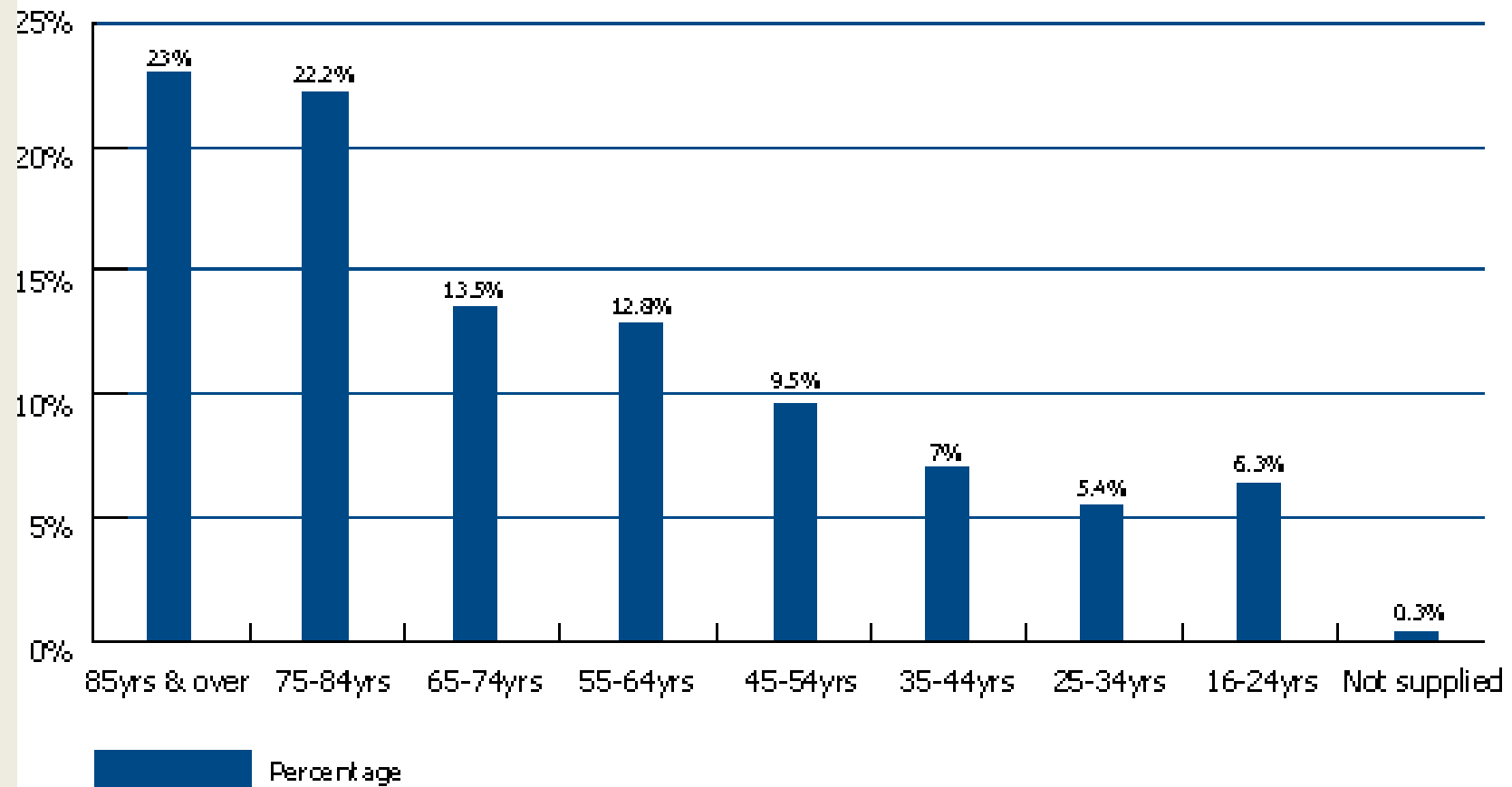


2011/2012 WORKLOAD

- Guardianship: 2584
- Financial management: 2553
- Requested review of guardianship: 230
- Statutory review of guardianship: 1855
- Requested review of financial management: 539
- Statutory review of financial management: 157
- Review of enduring power of attorney: 176
- Review of enduring guardianship: 83
- Medical/Dental consent: 376
- Recognition of appointment: 44
- Clinical Trial: 9
- Directions to guardian: 1
- Procedurals: 1320

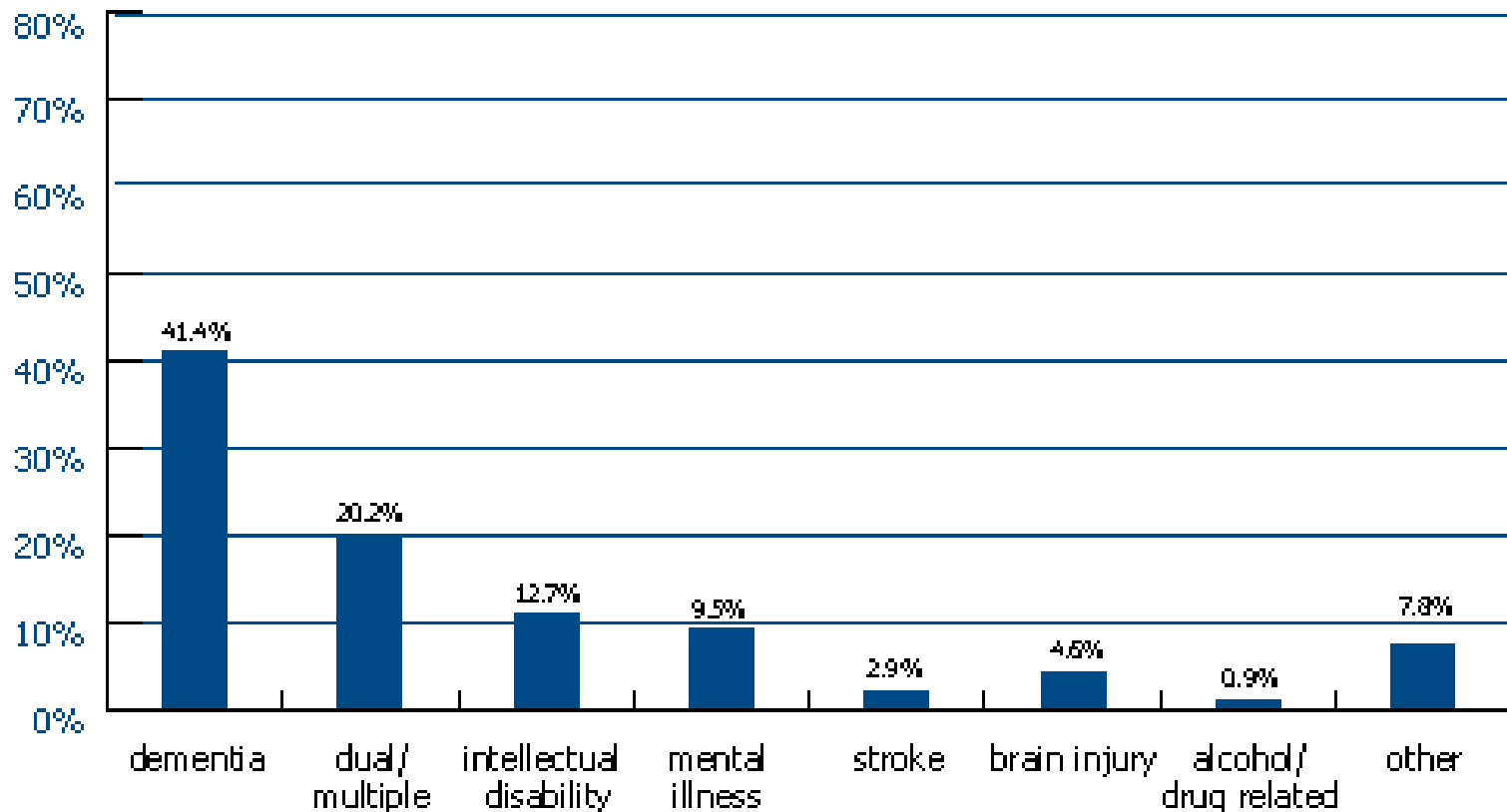
DEMOGRAPHICS

Graph 1 Age demographic of people the subject of applications to the Tribunal in 2011/2012



DEMOGRAPHICS

Graph 2 Disability reported in applications received by the Tribunal in 2011/2012



The Tribunal has revised the scope and method of statistical reporting and has excluded data relating to dementia from the category 'dual disability'. Caution should be exercised in comparing data in this report with those in previous annual reports.

LEGAL REPRESENTATION TRENDS

	2007/2008	2008/2009	2009/2010	2010/2011	2011/2012
Leave applications received	185	180	224	256	301
Leave applications granted	121	139	165	169	201
Separate representative appointments	70	84	150	328	511

APPOINTING AN ENDURING GUARDIAN

- A statutory scheme established by the Guardianship Act.
- Enduring guardianship appointments have been in place since February 1998
- Further amendments were made in 2003 and 2010.
- No case law has been developed to assist in interpreting those statutory provisions.

WHO CAN APPOINT AN ENDURING GUARDIAN?

- Over 18yrs age (section 6)
- Must have capacity to execute the instrument
- No statutory test about level of capacity required
- Not aware of any case law specifically on capacity required to appoint an enduring guardian.
- The test for capacity is "issue specific" (*Masterman-Lister v Brutton & Co* [2003] 3 All ER 162)
- Capacity means the capacity to understand the nature of the particular transaction when it is explained (*Gibbons v Wright* (1954) 91 CLR 423)
- See: Capacity Guidelines (Law Society)

WHO CAN BE AN ENDURING GUARDIAN?

Section 6B:

- Anyone over 18 yrs
- But not if they are involved in providing the appointor with :
 - Medical care, eg their GP
 - Accommodation services, eg someone who works at the nursing home where the appointor lives
 - Daily living services, eg Meals on Wheels worker
 - Or the spouse, parent, child, brother or sister relatives of such a person

PRACTICAL CONSIDERATIONS

- Is it workable?
- Is the enduring guardian available to make decisions? Can be easily contactable? Have the time and commitment to be involved?
- Would they look at all options before making a decision?
- Work co-operatively with other family members and any financial decision-maker, eg the attorney?
- Comply with S.4 principles in the Guardianship Act.

DECISIONS/FUNCTIONS

Section 6E

- Different type of decisions the enduring guardian can make called 'functions'
- Person appointing the e.g. (the appointor) decides
 - Accommodation
 - Health Care
 - Medical and Dental Consent
 - Services
 - Any other functions specified in the instrument
- The instrument may limit or exclude the authority it confers in relation to any of the above functions.
- Add any functions appropriate to the needs of the person.

LIMITS ON ENDURING GUARDIAN'S POWERS

Section 6E (cont..):

- The functions are to be exercised in accordance with any **lawful directions** in the appointment (s6E(3)GA)
 - E.g. they should consult all the appointor's children before making a decision
- Enduring guardian cannot be directed to do something which is unlawful, such as euthanasia (reference??)
- If the enduring guardian has the function of giving consent to medical treatment then they must make these decisions in accordance with Part 5 of the Guardianship Act.
- The enduring guardian has the same rights to access information as the appointor for the purpose of exercising a function (section 6E(2A)).

MORE THAN ONE ENDURING GUARDIAN

Section 6D:

- (1) An instrument appointing an enduring guardian may appoint 2 or more such guardians to act jointly, severally or jointly and severally.
- (2) Joint and several – act at their discretion unless directed otherwise. Vacation of one does not terminate the appointment unless instrument states otherwise.
- (3) Several – different functions conferred upon each enduring guardian.
- (4) Joint – instrument may provide that death, resignation or incapacity does not operate to terminate the appointment.
 - Where the instrument doesn't provide for this, the remaining EG can apply to the Tribunal for confirmation of the appointment (6D(6)).

ALTERNATIVE ENDURING GUARDIAN

- **6DA Alternative enduring guardians**
- (1) An instrument of appointment of an enduring guardian (the ***original enduring guardian***) may appoint another person to be an alternative enduring guardian of the appointor.
- (2) The instrument of appointment does not operate to appoint a person as an alternative enduring guardian unless it is endorsed with the person's acceptance of the appointment.
- (3) An alternative enduring guardian has (and may exercise) the functions of an original enduring guardian only:
 - (a) if the original enduring guardian dies, or
 - (b) if the original enduring guardian resigns, or
 - (c) during any incapacity of the original enduring guardian.
- Not because main guardian unavailable or unwilling to act – in these circumstances GT could review.

CAN THERE BE MORE THAN ONE ALTERNATIVE ENDURING GUARDIAN?

- **6DA Alternative enduring guardians**
- (4) If 2 or more original enduring guardians are appointed by the instrument of appointment, the alternative enduring guardian:
 - (a) is taken to have been appointed as an alternative enduring guardian for each of the original enduring guardians unless the instrument of appointment provides otherwise, and
 - (b) if the original enduring guardians were appointed jointly and all of them have died, resigned or become incapacitated—section 6D operates in relation to that alternative enduring guardian as if he or she had been appointed as an original enduring guardian by the instrument of appointment and was the only remaining original enduring guardian.
- (5) A reference in a provision of this Act (other than this section) to an enduring guardian is to be read as a reference to the alternative enduring guardian while that person has, and may exercise, the functions of an original enduring guardian.

WHO CAN BE A WITNESS?

Section 6C

- The form must be signed by the appointor and the enduring guardian in front of a witness
- Eligible witnesses (section 5):
 - an Australian legal practitioner
 - registrar of a Local Court
 - An approved employee of the NSW Trustee and Guardian (Reg cl4)
 - Overseas registered foreign lawyers (Reg cl4)
- Witness certificates must state that the person executed voluntarily and appeared to understand the effect of the instrument (6C(1)(e)).

ENDURING GUARDIAN'S ACCEPTANCE

Section 6C:

- The enduring guardian must also sign the form accepting their appointment.
- They cannot make decisions until they have signed it.
- Their signature must also be witnessed.
- Witness certificates must state that the person executed voluntarily and appeared to understand the effect of the instrument (6C(1)(e)).
- Doesn't have to be the same witness for the appointor and the enduring guardian 6C(4)(a)).
- Can be witnessed by different witnesses at different times and places (6C(4)(b))

NO REGISTRATION

- No requirement to register with Guardianship Tribunal or elsewhere
- Not publicly registered or on hospital records system so no way medical practitioners know that one has been appointed – some Health Areas piloting projects

WHEN DOES IT COME INTO EFFECT?

Section 6A:

- It only comes into effect when person lost capacity i.e. when they are “**a person in need of a guardian**”.
 - "person in need of a guardian" means a person who, because of a disability, is totally or partially incapable of managing his or her person. [S.3(1)]
- Section 3 (2) – disability means a person
 - (a) who is intellectually, physically, psychologically or sensorily disabled,
 - (b) who is of advanced age,
 - (c) who is a mentally ill person within the meaning of Chapter 3 of the [Mental Health Act 1990](#) , or
 - (d) who is otherwise disabled,and **who, by virtue of that fact, is restricted in one or more major life activities to such an extent that he or she requires supervision or social habilitation.**
- If there is doubt about that, the enduring guardian may have to get a medical report to show this.

RESIGNATION/REVOCAATION

Resignation

- Resignation must be in prescribed form and duly witnessed.
- If appointor not “person in need of a guardian” then enduring guardian can resign by written notice.
- If appointor is a “person in need of a guardian”, then need approval of GT to resign
- Section 6HB

Revocation

- In writing.
- Witnessed.
- Must be given to the enduring guardian to be an effective revocation.
- Marriage/remarriage automatically revokes an enduring guardianship appointment unless marry/remarry the enduring guardian.

ENDURING GUARDIANSHIP APPOINTMENT FORM

Section 6C: Method of Appointment

(1) An instrument does not operate to appoint a person as an enduring guardian unless:

(a) it is in or to the effect of the form prescribed by the regulations

- The Tribunal developed a new guide and appointment of enduring guardian form to assist the community.
- Attempted to incorporate much of the feedback that had been received from the community and the legal community about problems with the prescribed form in the Regulation.
- All solicitors are able to develop their own Appointment of Enduring Guardian form suitable to meet the needs of their clients.

Planning ahead . . . enduring guardianship



For New South Wales

A guide to assist you in planning for your future

The information in this guide is to help you plan ahead for personal or lifestyle decisions. It is not legal advice. Please read this guide before completing the Appointment of Enduring Guardian form.

What is an enduring guardian?

An enduring guardian is someone you appoint to make personal or lifestyle decisions for you when you are not capable of doing this for yourself. You choose which kind of 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 make our own decisions about our lifestyle such as where we live and what medical treatment and services we have. Unfortunately this is not always possible. People may lose the capacity to make these decisions through accidents, illness or degenerative conditions.

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.

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.

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 you with accommodation services or support services for daily living on a professional basis; or
- is a relative of one of the above.

GUIDE

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.

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. You can only appoint one alternative enduring guardian.

You can appoint your enduring guardians to act:

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

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, resigns or is incapable of continuing in their role. This depends on how you appointed the enduring guardians.

If you appointed them to act jointly and one of them dies, resigns or becomes incapacitated, 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 severally or jointly and severally then the appointment of the remaining 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 enduring guardian you have appointed dies, resigns or becomes incapacitated, you can make a new enduring guardianship appointment and appoint someone else to be your enduring guardian. If you do not have the mental capacity to do this, the Guardianship 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.

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 your enduring guardians 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.

What are the witnessing requirements?

Your signature and the signature of your enduring guardian/s must be witnessed by an:

- Australian legal practitioner
- Registrar of the NSW Local Court
- Overseas registered foreign lawyer
- Approved employee of the NSW Trustee and Guardian or the Office of the Public Guardian

Only these witnesses can witness the execution of this appointment. 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 if I am physically unable to sign this enduring guardian appointment?

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.

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 enduring guardianship appointment if they feel that your enduring guardian is not making appropriate decisions on your behalf. The Tribunal can vary or revoke the appointment or confirm it without any changes. It may also change the functions in the appointment or make a guardianship order.

The Tribunal does not supervise enduring guardians. It can only review an enduring guardianship appointment if it receives an application from a concerned person and supporting information.

GUIDE

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, 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.
- 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 the enduring guardian.
- If the Tribunal makes a guardianship order which suspends any appointment of an enduring guardian.

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, otherwise the revocation is ineffective.

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 recognising enduring guardianship appointments made in other states or countries.

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

What should I do with the appointment?

After the appointment form is completed there is no requirement to formally lodge it anywhere. 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).

Appointment of Enduring Guardian

(Guardianship Regulation 2010, Schedule 1)

I, _____
(insert name, address and occupation)

Appoint _____
(insert the name, address and occupation of each proposed enduring guardian)

to be my enduring guardian/s.

I appoint my enduring guardians to act jointly/severally/jointly and severally.

The death, resignation or incapacity of any of my joint enduring guardians does/does not terminate the appointment of each of my other joint enduring guardians.

I authorise my enduring guardian/s to exercise the following functions:

- a) to decide where I live
- b) to decide what health care I receive
- c) to decide what other kinds of personal services I receive
- d) to consent to the carrying out of medical or dental treatment on me (in accordance with Part 5 of the *Guardianship Act 1987*)
- e) *(insert any additional functions)*

I place the following limits on the authority of my enduring guardian/s:
(insert any limits)

Read the important information at the back of this form prior to completing.

Complete your details in the space provided.

Appointor -

The person who makes an enduring guardian appointment is known as the appointor.

Enduring guardians -

You may appoint one or more people to be your enduring guardian/s.

If you are appointing more than one enduring guardian complete details for each guardian.

Note: an enduring guardian must be 18 years of age and not have any connection with those who provide you with accommodation, health care or services for a fee.

Complete this section if you wish to appoint an alternative guardian. An alternative guardian is someone who you appoint to be your enduring guardian if your enduring guardian/s dies, resigns or becomes incapacitated.

Note: Cross out this section if you do not wish to appoint an alternative guardian.

Appointment of Enduring Guardian

For New South Wales
(Guardianship Regulation 2010, Schedule 1)



1. Appointment of enduring guardian/s

I, *(your full name)*: _____

Of *(your address)*: _____

Occupation: _____

Phone number: _____

Date of birth: _____

Appoint *(guardian's name)*: _____

Of *(guardian's address)*: _____

Phone number: _____

Occupation: _____

Appoint *(guardian's name)*: _____

Of *(guardian's address)*: _____

Phone number: _____

Occupation: _____

Appoint *(guardian's name)*: _____

Of *(guardian's address)*: _____

Phone number: _____

Occupation: _____

to be my enduring guardian/s.

2. Optional - alternative guardian

I appoint *(alternative enduring guardian's name)*: _____

Of *(address)*: _____

Phone number: _____

Occupation: _____

to be my alternative enduring guardian.

Appointment of Enduring Guardian

(Guardianship Regulation 2010, Schedule 1)

I, _____
[insert name, address and occupation]

Appoint _____
[insert the name, address and occupation of each proposed enduring guardian]

to be my enduring guardian/s.

I appoint my enduring guardians to act jointly/severally/jointly and severally.

The death, resignation or incapacity of any of my joint enduring guardians does/does not terminate the appointment of each of my other joint enduring guardians.

I authorise my enduring guardian/s to exercise the following functions:

- a) to decide where I live
- b) to decide what health care I receive
- c) to decide what other kinds of personal services I receive
- d) to consent to the carrying out of medical or dental treatment on me (in accordance with Part 5 of the *Guardianship Act 1987*)
- e) *[insert any additional functions]*

I place the following limits on the authority of my enduring guardian/s:

[insert any limits]

Tick applicable box(es) to indicate how you wish your enduring guardians to make decisions on your behalf.

Jointly

This means the enduring guardians must make all decisions together.

If you have appointed your enduring guardians to act jointly your enduring guardianship appointment will automatically terminate if one of your enduring guardians dies, resigns or becomes incapacitated.

If you do not want the appointment to terminate but want the remaining enduring guardian/s to continue in their role then tick the appropriate box.

Severally

This means the enduring guardians can make decisions separately of each other.

If you have appointed your enduring guardians to act severally your enduring guardianship appointment will automatically continue if one of your enduring guardians dies, resigns or becomes incapacitated.

Jointly and severally

This means the enduring guardians can either make decisions together or separately.

If you have appointed your enduring guardians to act jointly and severally your enduring guardianship appointment will automatically continue if one of your enduring guardians dies, resigns or becomes incapacitated. If you do not want the appointment to continue but want it to terminate then tick the appropriate box.

3. How I wish my enduring guardians to act

[Complete only if more than one enduring guardian has been appointed]

Tick the applicable box below to indicate whether you are appointing your enduring guardians to act jointly, severally or jointly and severally.

Also indicate by ticking the appropriate box whether you want your jointly/jointly and severally appointed enduring guardian/s to continue in their role in the event of death, resignation or loss of capacity.

3a) Joint appointment

I appoint my enduring guardians to act jointly and
[tick applicable box below]

I want the appointment to be terminated if one of my enduring guardians dies, resigns or loses capacity.

OR

I do not want the appointment to be terminated if one of my enduring guardians dies, resigns or loses capacity.

3b) Several appointment

I appoint my enduring guardians to act severally.

3c) Joint and several appointment

I appoint my enduring guardians to act jointly and severally and
[tick applicable box below]

I want the appointment to be terminated if one of my enduring guardians dies, resigns or loses capacity.

OR

I do not want the appointment to be terminated if one of my enduring guardians dies, resigns or loses capacity.

The functions of my enduring guardian/s must be exercised in accordance with the following directions:

[insert any directions]

Signature: _____

Date: _____

AND if a person signs this instrument on another person's behalf

[insert name and address of the person who signs the document]

Acceptance by enduring guardian

I accept my appointment as enduring guardian.

Name: _____

Signature: _____

Date: _____

Certificate of witness

I, _____
[insert name, address and occupation]
certify that:

a) _____

[insert name of person appointing enduring guardian]

appeared to understand the effect of this instrument and in my presence:

(i) executed the instrument voluntarily, or

(ii) voluntarily instructed _____

[insert name of person signing on behalf of person appointing enduring guardian]

to sign the instrument on his or her behalf and that person executed the instrument in my presence, and

b) _____

[insert name of person accepting appointment as enduring guardian] appeared to understand the effect of this instrument and in my presence executed the instrument voluntarily.

Select what functions you wish your enduring guardian/s to have should you lose capacity to make decisions yourself.

You may place limits on these functions. If you wish to place a limit on the function provide details in the space below each function.

Note:

Your enduring guardian/s can only exercise these functions if you have lost the capacity to make decisions yourself.

You may add any additional functions you wish your enduring guardian/s to exercise on your behalf.

For example other functions could include:

- access (making decisions about who you should have contact with).
- restrictive practices (deciding whether to consent to the use of physical restraint for a limited period to protect you from self harm).
- end of life care (deciding what care and treatment you should receive at the end of your life).

If you wish to add this option complete 'Directions to enduring guardians' on the following page.

4. Functions and limits of my enduring guardian/s

Should I become incapable of making my own personal decisions I authorise my enduring guardian/s to exercise the following functions:

[tick any one or more boxes below]

to decide where I live
Limits on authority of enduring guardian: _____

to decide what health care I receive
Limits on authority of enduring guardian: _____

to decide what other kinds of personal services I receive
Limits on authority of enduring guardian: _____

to consent to the carrying out of medical or dental treatment on me
(in accordance with Part 5 of the Guardianship Act 1987)
Limits on authority of enduring guardian: _____

to decide: _____

The functions of my enduring guardian/s must be exercised in accordance with the following directions:

[insert any directions]

Signature: _____

Date: _____

AND if a person signs this instrument on another person's behalf

[insert name and address of the person who signs the document]

Acceptance by enduring guardian

I accept my appointment as enduring guardian.

Name: _____

Signature: _____

Date: _____

Certificate of witness

I, _____

[insert name, address and occupation]

certify that:

a) _____

[insert name of person appointing enduring guardian]

appeared to understand the effect of this instrument and in my presence:

(i) executed the instrument voluntarily, or

(ii) voluntarily instructed _____

[insert name of person signing on behalf of person appointing enduring guardian]

to sign the instrument on his or her behalf and that person executed the instrument in my presence, and

b) _____

[insert name of person accepting appointment as enduring guardian] appeared to understand the effect of this instrument and in my presence executed the instrument voluntarily.

Signatures and witnessing

- The prescribed form does not allow for separate certificates of witness for the principal and the enduring guardian if executed at different times.
- It does not allow for acceptance by more than one enduring guardian.
- It also does not allow for the acceptance of an alternate enduring guardian.

The new form:

- Page 5 is for the signature of the principal.
- More space and extra detail for the eligible signer.
- If enduring guardian is executing at the same time – sign this page.
- Detailed information taken from eligible witness.

You and your enduring guardian can sign this page at the same time, in front of the same witness.

If your enduring guardians signature is witnessed at a different time or by a different witness, they will need a separate witness certificate. Complete additional signature and witness certificate pages.

Note:
Before you sign here you must arrange for a witness to watch you sign this appointment and certify that you appear to understand this appointment. Your witness needs to complete their details in section 6d) below.

If you are physically unable to sign ask the person signing for you to sign and complete their details opposite.

The witness cannot be the enduring guardian, or an alternative enduring guardian.

The witness must be an Australian legal practitioner/Registrar of the NSW Local Court/overseas-registered foreign lawyer/approved employee of the NSW Trustee and Guardian or the Office of the Public Guardian. Only these persons can witness the execution of this appointment.

IMPORTANT Refer to checklist on page 12 before completing this section

6. Appointor's signature and witness certificate (Option - for enduring guardian signature/witness)

6a) My signature

Signature _____ Date _____

6b) Optional - signature on my behalf

The appointor instructed me to sign this appointment on their behalf.

Signature on behalf of appointor _____

Date _____

Signer's full name _____

Signer's address _____

Signer's phone number: _____

6c) Acceptance by enduring guardian

[Complete only if witnessed at the same time and by the same witness as appointor. Cross out if this does not apply]

I accept my appointment as enduring guardian.

Full name _____

Signature _____ Date _____

6d) My witness certificate

I, [full name] _____

Of [address] _____

Phone number _____

Occupation:

- Australian legal practitioner
- Registrar of the NSW Local Court
- Overseas-registered foreign lawyer
- Approved employee of the NSW Trustee and Guardian/ the Office of the Public Guardian

Certify that: *[Tick applicable boxes below, cross out those which do not apply]*

The appointor appeared to understand the effect of this instrument and voluntarily executed the instrument in my presence.

The appointor voluntarily instructed *[insert signer's full name]*

_____ to sign the instrument on their behalf and that person executed the instrument in my presence.

[insert name of person accepting appointment as enduring guardian] appeared to understand the effect of this instrument and voluntarily executed the instrument in my presence.

Signature _____ Date _____

Page 6:

- Alternative enduring guardian's acceptance and witness certificate

Note:
Before the alternative enduring guardian signs here they must arrange for a witness to watch them sign this form. The witness needs to complete their details in section 7b) below.

The witness cannot be the enduring guardian, or an alternative enduring guardian/s.

The witness must be an Australian legal practitioner/Registrar of the NSW Local Court/overseas-registered foreign lawyer/approved employee of the NSW Trustee and Guardian or the Office of the Public Guardian. Only these persons can witness the execution of this appointment.

7. Optional - alternative enduring guardian's acceptance and witness certificate

7a) Acceptance by alternative enduring guardian

[Complete only if alternative enduring guardian appointed]

I accept my appointment as alternative enduring guardian.

Full name _____

Signature _____

Date _____

7b) Alternative enduring guardian's witness certificate

I, *[full name]*: _____

Of *[address]*: _____

Phone number: _____

Occupation:

- Australian legal practitioner
- Registrar of the NSW Local Court
- Overseas-registered foreign lawyer
- Approved employee of the NSW Trustee and Guardian/ the Office of the Public Guardian

Certify that: _____

[insert name of person accepting appointment as alternative enduring guardian]

appeared to understand the effect of this instrument and voluntarily executed the instrument in my presence.

Signature: _____

Date: _____

Page 7:

- Enduring guardian's acceptance with witness certificate (if being executed at a different time to the principal).

Note:

Before the enduring guardian signs here they must arrange for a witness to watch them sign this form. The witness needs to complete their details in section 8b) below.

The witness cannot be the enduring guardian, or an alternative enduring guardian/s.

The witness must be an Australian legal practitioner/Registrar of the NSW Local Court/overseas-registered foreign lawyer/approved employee of the NSW Trustee and Guardian or the Office of the Public Guardian. Only these persons can witness the execution of this appointment.

8. Enduring guardian's acceptance and witness certificate

8a) Acceptance by enduring guardian

[Cross out if enduring guardian has already signed and enduring guardian's witness certificate has been completed]

I accept my appointment as enduring guardian.

Full name _____

Signature _____

Date _____

8b) Enduring guardian's witness certificate

I, *[full name]*: _____

Of *[address]*: _____

Phone number: _____

Occupation:

- Australian legal practitioner
- Registrar of the NSW Local Court
- Overseas-registered foreign lawyer
- Approved employee of the NSW Trustee and Guardian/the Office of the Public Guardian

Certify that:

[insert name of person accepting appointment as enduring guardian]

appeared to understand the effect of this instrument and voluntarily executed the instrument in my presence.

Signature: _____

Date: _____

Pages 8 and 9:

- Additional enduring guardians' acceptance with witness certificates (if being executed at a different time to the principal).

Note:

Before you sign here you must arrange for a witness to watch you sign this form. The witness needs to complete their details in section 9b) below.

The witnesses cannot be the enduring guardian, or an alternative enduring guardian/s.

The witness must be an Australian legal practitioner/Registrar of the NSW Local Court/overseas-registered foreign lawyer/approved employee of the NSW Trustee and Guardian or the Office of the Public Guardian. Only these persons can witness the execution of this appointment.

9. Additional enduring guardian's signature and witness certificate/s

[Cross out if enduring guardian has already signed and enduring guardian's witness certificate has been completed]

9a) Acceptance by enduring guardian

I accept my appointment as enduring guardian.

Full name _____

Signature _____

Date _____

9b) Enduring guardian's witness certificate

[Cross out if enduring guardian's signature already witnessed]

I, [full name]: _____

Of [address]: _____

Phone number: _____

Occupation: Australian legal practitioner
 Registrar of the NSW Local Court
 Overseas-registered foreign lawyer
 Approved employee of the NSW Trustee and Guardian/ the Office of the Public Guardian

Certify that: _____

[insert name of person accepting appointment as enduring guardian]

appeared to understand the effect of this instrument and voluntarily executed the instrument in my presence.

Signature: _____

Date: _____

Signature: _____

Date: _____

Australian legal practitioner/Registrar of the Local Court / overseas-registered foreign lawyer/approved employee of NSW Trustee and Guardian or the Office of the Public Guardian

Note. Important information

An enduring guardianship appointment is an important document. It allows someone else to make medical and lifestyle decisions on your behalf. You should get legal or medical advice (or both) before you sign it.

It is important that you trust the person you appoint as your enduring guardian to make appropriate lifestyle decisions on your behalf. It is recommended you inform this person of your wishes about lifestyle decisions and involve them in discussions about your views or goals. If these change, it is important to let your enduring guardian know.

An enduring guardian can only make lifestyle decisions such as health decisions. You should make an enduring Power of Attorney if you want someone to make financial decisions on your behalf if you lose capacity.

If you appoint more than one enduring guardian, you should indicate whether the enduring guardians are to act jointly, severally or jointly and severally.

Enduring guardians who are appointed jointly are only able to make decisions if they all agree about the decision. Enduring guardians who are appointed severally or jointly and severally are able to make decisions independently of each other.

If you appoint an alternative enduring guardian, they will only have authority to act as your guardian if the first appointed enduring guardian dies, resigns or becomes incapacitated.

Each enduring guardian must sign their acceptance on the appointment for it to be effective.

If someone signs the appointment on your behalf, they must be at least 18 years old. They must not be the person being appointed as an enduring guardian. They cannot also witness the execution of the appointment.

If you marry after you appoint an enduring guardian then the appointment will automatically be revoked (unless you married your enduring guardian).

Your enduring guardian can resign at any time, by giving you notice in writing. If you have lost capacity to make decisions at that time then your enduring guardian can only resign with the approval of the Guardianship Tribunal.



Important information

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- An enduring guardian can only make lifestyle decisions such as health decisions. You should make an enduring Power of Attorney if you want someone to make financial decisions on your behalf if you lose capacity.
- If you appoint more than one enduring guardian, you should indicate whether the enduring guardians are to act jointly, severally or jointly and severally.
- Enduring guardians who are appointed jointly are only able to make decisions if they all agree about the decision. Enduring guardians who are appointed severally or jointly and severally are able to make decisions independently of each other.
- If you appoint an alternative enduring guardian, they will only have authority to act as your guardian if the first appointed enduring guardian dies, resigns or becomes incapacitated.
- Each enduring guardian must sign their acceptance on the appointment for it to be effective.
- If someone signs the appointment on your behalf, they must be at least 18 years old. They must not be the person being appointed as an enduring guardian. They cannot also witness the execution of the appointment.
- If you marry after you appoint an enduring guardian then the appointment will automatically be revoked (unless you married your enduring guardian).
- Your enduring guardian can resign at any time, by giving you notice in writing. If you have lost capacity to make decisions at that time then your enduring guardian can only resign with the approval of the Guardianship Tribunal.

Enduring guardianship appointments are not automatically accessible on any public register. Therefore, it is important that key people are aware of the appointment so they can contact the enduring guardian if required. You should provide a copy of the enduring guardianship appointment to your enduring guardian and keep a copy in a safe place. You should also let close friends or family know about it and give a copy to your solicitor, doctor and health service provider.

For further information about enduring guardianship, contact the NSW Trustee and Guardian, the Office of the Public Guardian or the Guardianship Tribunal.

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- For further information about enduring guardianship, contact the NSW Trustee and Guardian, the Office of the Public Guardian or the Guardianship Tribunal.

For more information contact

The NSW Trustee and Guardian

Telephone (02) 8688 2600
Toll Free 1300 360 466
Facsimile (02) 8688 9783
Telephone typewriter 1800 882 889
Email tagmail@tag.nsw.gov.au
Website www.tag.nsw.gov.au
Postal address Locked Bag 5115, Parramatta NSW 2124

The Public Guardian

Telephone (02) 8688 2650
Toll free 1800 451 510
Facsimile (02) 8688 9797
Telephone Typewriter 1800 882 889
Email informationsupport@opg.nsw.gov.au
Website www.lawlink.nsw.gov.au/opg
Postal address Locked Bag 5116, Parramatta NSW 2124

The Guardianship Tribunal

Telephone (02) 9556 7600
Toll free 1800 463 928
Facsimile (02) 9555 9049
Telephone typewriter (02) 9556 7634
Email gt@gt.nsw.gov.au
Website www.gt.nsw.gov.au
Postal address Locked Bag 9, Balmain NSW 2041

Planning ahead . . . enduring guardianship



Checklist

Please read below and tick to ensure you have completed all details of your enduring guardianship appointment correctly.

1. I have read and understood the 'Important Information' outlined on pages 10 and 11.
2. I have spoken to my proposed enduring guardian/s and discussed this appointment with them to ensure they are willing and able to take on this role and exercise the functions I wish to give them as described in sections 3 and 4 on pages 2 and 3.
3. I have spoken to my enduring guardian/s about the kind of lifestyle decisions I wish them to make on my behalf should I lose capacity.
4. I have discussed the appointment of my enduring guardian/s with my close friends/family to let them know of my decision to appoint an enduring guardian.
5. I have considered the option in section 2 of appointing an alternative guardian should my first appointed enduring guardian die, resign or become incapacitated.
6. I have indicated how I wish my enduring guardians to act (ie jointly, severally or jointly and severally) by completing section 3 on page 2.
7. I understand I can ask someone to sign this appointment on my behalf in section 6 if I am physically unable to sign. This person must be over the age of 18 and cannot be my enduring guardian/s or a witness to this appointment.
8. I understand the certificate of witness needs to be completed by an eligible witness, ie an Australian legal practitioner/Registrar of the NSW Local Court/overseas-registered foreign lawyer/approved employee of the NSW Trustee and Guardian or the Office of the Public Guardian.
9. I understand my enduring guardian/s need to sign their acceptance of the enduring guardian appointment before it can operate.
10. I understand it is important to give a copy of this enduring guardianship appointment to my enduring guardian/s and other relevant people, such as my GP and I will keep a copy in a safe place.

Appointor's signature

Date

CHECKLIST

REVIEWS OF ENDURING GUARDIANSHIP

- The Tribunal's role in respect of the review of enduring guardianship appointments are described in Part 2 of the Act, section 6J:
 1. The Tribunal:
 - (a) may, on its own motion, and
 - (b) must, at the request of any person who, in the opinion of the Tribunal, has a genuine concern for the welfare of the appointor,
review the appointment (or purported appointment) of an enduring guardian.

WHO CAN MAKE AN APPLICATION?

- **ACT [2007] NSWGT 15 (29 August 2007)**

“In the context of the Act, the Tribunal sees a “genuine concern for the welfare” of the person as requiring:

1. That the applicant is bringing to the attention of the Tribunal a fact situation in which the subject person’s interests may call for intervention by the Tribunal;
2. That the applicant is sincere in seeing the situation as one that may call for the intervention of the Tribunal in the interests of the person; and
3. That the application is motivated by a desire to advance the welfare of the person.

The third requirement does not necessarily mean that the applicant is only focused on the interests of the person.”

THE PARTIES TO THE APPLICATION

- Section 3(F)(4):
 - (a) the person, if any, who requested the review;
 - (b) the person appointed as the enduring guardian;
 - (c) the person who appointed the enduring guardian;
 - (d) the spouse, if any, of the person who appointed the enduring guardian, if the relationship between the person and the spouse is close and continuing;
 - (e) the person, if any, who has the care of the person who appointed the enduring guardian; and
 - (f) any person whom the Tribunal has joined as a party under Section 57(a)

WHAT ORDERS CAN THE TRIBUNAL MAKE?

- Section 6K(1):
On reviewing the appointment of enduring guardian, the Tribunal may:
 - (a) **revoke** the appointment, or
 - (b) **confirm** the appointment, with or without **varying the functions** of the enduring guardian under the appointment.

- Section 6K(2):
The Tribunal must not revoke the appointment of an enduring guardian unless:
 - (a) the enduring guardian requested the revocation; or
 - (b) the Tribunal is satisfied that it is in the **best interests** of the appointer that the appointment is revoked.

WHAT CAN WE DO IF WE REVOKE?

- Section 6K(3):

If, in the course of the review, the Tribunal decides to revoke the appointment of enduring guardian, it may proceed as if:-

- (a) an application for a **guardianship order** under Part 3, or
- (b) an application for a **financial management order** under Part 3(A); or
- (c) applications for **both** such orders,

has been made in respect of the person who appointed the enduring guardian.

MATTERS OF INTERPRETATION

- The Tribunal has no authority to make orders or declarations solely in relation to the act of revocation of an enduring guardianship appointment.
- If making an order pursuant to Section 6(K)(1)(b) to confirm an appointment and vary the functions – to what extent can we vary the functions? eg. Can we/should we, grant the appointee a coercive accommodation function? To what extent should the Tribunal interfere with the expressed wishes of the principal?
- There is no statutory review of enduring guardianship appointments and therefore any variation of functions continue without review – does this clash with least restrictive principle?

SUBSTITUTION OF ENDURING GUARDIANS

- Section 6MA(1)

“The Tribunal may, of its own motion or on the application of a person who, in the opinion of the Tribunal, has a genuine concern for the welfare of an appointer, appoint a person to replace an appointee as an enduring guardian of the appointer if the appointee has **died**, **resigned** or become **incapacitated**”

- Section 6M(A)(2)

“The Tribunal may appoint a person to replace an appointee under sub-section (1) only if:

- (a) the person is eligible to be appointed as an enduring guardian under this part; and
- (b) the Tribunal is satisfied that:
 - (i) the appointer is in need of an enduring guardian; and
 - (ii) the person has a close personal relationship with the appointer; and
 - (iii) the person is capable of carrying out the functions of an enduring guardian.”

SUBSTITUTION OF ENDURING GUARDIANS

- The Tribunal only has power to substitute an enduring guardianship appointee in the event that the appointee has died, has resigned or has become incapacitated.
- There is no power to substitute the appointee if there is evidence the appointee is acting in breach of the Act/principles or otherwise not in the Appointer's best interests. In these circumstances, the Tribunal can only revoke the appointment and seek to treat the application as an application for guardianship.
- Impact on specific wishes contained in the enduring guardianship instrument?

ENDURING GUARDIANSHIP AND ADVANCE CARE DIRECTIVES

- Advance Care Directives are a matter for the common law - the Tribunal does not have jurisdiction & there is no legislation.
- Advance Care Directives may be used as evidence during guardianship / enduring guardianship hearings.
- Could be relevant to the functions given to the guardian.

FI V PUBLIC GUARDIAN [2008] NSWADT 263

- Justice O'Connor held that a guardian with a healthcare function does not have the power to make advance care directive.
- A guardian with a health care function could consent to a advance care **plan** that may include withdrawing life sustaining treatment.
- The Tribunal does not need to appoint guardians with specific functions e.g. “end of life”.