

Enduring Guardian

Introduction

By appointing an Enduring Guardian you are giving power to take complete control of your personal affairs (health and lifestyle decision) to someone who's exercise of that power you will be incapable of understanding and therefore reviewing at the very time when you are most dependent on them.

Due to the importance of this decision there are only a small hand full of professions that can witness the appointment of an Enduring Guardian, all of which are either legal professionals, or qualified by special training, *and* the witness is required to certify that the person(s) whose signature(s) they witnessed signed the document voluntarily and appeared understand the effect of the Enduring Guardian document.

Properly witnessing the appointment of an Enduring Guardian will involve the following:

1. Confirm each person signing the document's identity from their driver's licence or other such identifying document;
2. Check that they understand the nature, significance, and effect of appointing an Enduring Guardian, or accepting their appointment as an Enduring Guardian;
3. Answer any questions and explain anything that needs to be explained;
4. Confirm that the "7 elements" necessary to validly appoint an Enduring Guardian are met;¹ and
5. Walk each person through the document, and confirm their understanding, prior to signing.

Each person will need to be seen privately to confirm their individual understanding and ensure that they are signing the document voluntarily.

The formal requirements must be observed in order to validly make the appointment(s), and duly discharge the responsibility entrusted to the witness.

The main purpose of the process will be to ensure proper understanding of the nature, significance, and effect of the document as drafted, prior to signing.

Lastly, it is worth noting, the more fully the person making the appointment understands what they are doing, (and the more fully considered the decisions effected by the Enduring Guardian document), the more likely the transition to guardianship will be smoother, easier to accept, and less frightening, for the person who is losing the ability to manage their own affairs.

¹ It should be noted that there is less literature by way of guidance available in relation to appointing an Enduring Guardian than there is in relation to granting an Enduring Power of Attorney, and that these elements are an adaptation of the "7 elements" necessary to validly grant an Enduring Power of Attorney. It is the author's view that if these elements are relevant to validly granting an Enduring Power of Attorney they must also be relevant (even if to varying degrees) to appointing an Enduring Guardian, and prudence dictates that the elements should be established.

The Guardianship Act

Under the *Guardianship Act 1987* (NSW):

1. The appointment of a guardian only has effect at such times as the person is “in need of a guardian”.
2. A person may chose in advance who they would like to be their guardian if one is needed. Such an appointed guardian is known as an "enduring guardian". This must be done in writing, and the document must be to the effect of the form contained in schedule 1 to the *Guardianship Regulations 2005* (NSW).
3. Depending on the content of the appointing document, an enduring guardian will be able to decide where the person who appointed them lives, decide what healthcare they receive, decide what personal services they receive, give consent to medical or dental treatment, and perform any other functions relating to "their person" specified in the document.
4. Conditions or limitations can be placed on the enduring guardian(s) power by specifying those conditions or limitations in the document. This includes excluding authority to exercise a function, as well as giving directions as to how a function is to be exercised. You can extend (as well as restrict) the authority of an enduring guardian by specifically stating so.
5. An enduring guardian is authorised by the Act to, on their appointor's behalf “sign and do all such things as are necessary to give effect to any function of the enduring guardian.”

For more information on appointing an enduring guardian see the *Guardianship Act 1987* (NSW) or the **enclosed** summary of the Guardianship Act titled "Guardianship".

The 7 Elements

The "7 elements" that must be understood in order to validly appoint and Enduring Guardian are:

1. How to “set the boundaries” of the power granted;
2. When the power operates;
3. The extent of the power;
4. The authority given;
5. When the appointment can and cannot be cancelled;
6. The nature and meaning of appointing an *enduring* Guardian; and
7. The limits to overseeing the exercise of the power.

Further explanation of the above elements is provided below.

1. *How to “set the boundaries” of the power granted*

You have the ability to specify:

1. what your guardian(s) **can** and **can’t** do;
2. **how** they must do anything they are empowered to do; and
3. any **conditions** that must be met (either before a power is granted or in the exercise of a power);

by stating so in the guardianship document, or by cancelling the guardianship document and making a new one at any time that you have sufficient capacity to do so.

A valid **Advance Care Directive** will also take priority over an Enduring Guardian's decisions, whether the directive is made before or after the appointment of your guardian(s).

For reasons of evidence and to avoid any question of incapacity, it is advisable to give any instructions at the same time that you appoint the Enduring Guardian(s).

2. *When the power operates*

The power will **not** be operational unless and until it is **accepted** by the relevant guardian(s), and if jointly appointed, **all guardians**, by signing the guardianship document.

The appointment of your guardian(s) only has effect at such times as you are “in need of a guardian”.

You can direct your lawyer, or any other person, not to provide a copy of the guardianship document to your guardian(s) until such time or event as is specified by you.

You can also specify **when** the power **will** and **will not** be operational, including such things as:

1. only for a certain period or period(s); or
2. only upon the occurrence of some other event (such as the inability or unwillingness of another person to act as your guardian or alternative decision maker²);

by stating so in the guardianship document, or by cancelling the guardianship document and making a new one at any time that you have sufficient capacity to do so.

3. *The extent of the power*

Unless you **state** otherwise *in the guardianship document*, your guardian(s) will be able to make **any** decisions relating to your health and lifestyle that fall within the areas in which they are appointed as your guardian(s).³

² Defined in the act as "person responsible"

³ There are however restrictions on a guardian's ability to make certain medical and dental decisions - see the enclosed summary of the Guardianship Act for more information

4. The authority given

Unless you **state** otherwise *in the guardianship document*, your guardian(s) will be able to:

1. Decide the place (such as a specific nursing home, or your own home) in which you are to live;
2. Decide the health care that you are to receive;
3. Decide the other kinds of personal services that you are to receive;
4. Give consent to the carrying out of medical or dental treatment on you;
5. Access personal and medical information about you;
6. Do any other thing or take any other actions relating to your person that is specified in the guardianship document.

Your guardian will **not** be able to do anything that you specifically **state** *in the guardianship document* your guardian is **not** authorised to do;

5. When the appointment can and cannot be cancelled

You can cancel the appointment of an Enduring Guardian at any time provided you have sufficient “**mental capacity**”. This means you must be able to **understand** what you are doing and appreciate the **nature** of what you are doing and the **significance** and **effect** of cancelling the appointment.

This means that you may **not** be able to cancel the appointment at the time when you are most **reliant** on the person you have appointed.

6. The nature and meaning of appointing an enduring guardian

The person(s) you appoint as your Enduring Guardian(s) will be your guardian(s) whenever you are incapable of understanding and/or managing your personal affairs.

Any decisions made by an Enduring Guardian will be valid even though they are beyond your ability to understand or comprehend.

An Enduring Guardian is a complete **legal alternative** decision maker for you.

7. The limits to overseeing the exercise of the power

If you have lost your ability to understand the nature, significance, or effect of any particular decision or action:

1. you will not be able to fully **assess** the appropriateness of that decision or action;
2. you will not be able to **change** the decision or action; and
3. you may not be able to **cancel**, limit or restrict your guardian's power;

even if you **disagree** with the guardian's exercise of the power.

Some specific things to think about

Why do you want/need to appoint an Enduring Guardian?

What do you want/need your guardian(s) to be able to do?

What *don't* you want/need your guardian(s) to be able to do?

How and in what areas are your views different to or likely to be different to those of your guardian(s)?

How will you ensure that your guardian(s) put your interests (and preferences) first?