

Guardianship

This is a “plain English” summary of the main sections of the *Guardianship Act 1987* (NSW) – it is not a substitute for the terms of the Act itself, but may serve as a useful reference source – recourse should always be had to the exact terms of the Act.

The information contained in the summary was current as at 24 March 2014, but may have changed since then.

You should check the most recent version of the Act which can be found at:

<http://www.legislation.nsw.gov.au/>

The principles of guardianship

Section 4 sets out the principles of guardianship, Section 4 states:

- “ It is the duty of everyone exercising functions under this Act with respect to persons who have disabilities to observe the following principles:*
- (a) the welfare and interests of such persons should be given paramount consideration,*
 - (b) the freedom of decision and freedom of action of such persons should be restricted as little as possible,*
 - (c) such persons should be encouraged, as far as possible, to live a normal life in the community,*
 - (d) the views of such persons in relation to the exercise of those functions should be taken into consideration,*
 - (e) the importance of preserving the family relationships and the cultural and linguistic environments of such persons should be recognised,*
 - (f) such persons should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs,*
 - (g) such persons should be protected from neglect, abuse and exploitation,*
 - (h) the community should be encouraged to apply and promote these principles. ”*

The difference between “a guardian” and “an enduring guardian”

“An enduring guardian” is a guardian that is appointed by you at a time when you are not in need of a guardian, in anticipation of needing a guardian at some future time.

“A guardian” is used throughout the Act to mean both an enduring guardian, and/or a guardian that is appointed by the Supreme Court or the Guardianship Tribunal at a time when you are in need of a guardian. However, in sections 7 to 25U (Part 3 of the Act) “a guardian” means only a guardian that is appointed by the Supreme Court or the Guardianship Tribunal at a time when you are in need of a guardian.

To avoid confusion, this document uses the term “enduring guardian” when referring to a guardian appointed by you, “Court appointed guardian” when referring to a guardian appointed by the Supreme Court or the Guardianship Tribunal, and “guardian” when referring to a power or restriction that applies to both.

Who can be an enduring guardian

Your enduring guardian(s) must be over 18, and must not be paid to provide medical services, accommodation, or other "daily living" services to you or be directly related to such a person, at the time they are appointed.¹

Technical requirements

The appointment of your enduring guardian(s) must be done in writing.²

The document must be to the effect of the form contained in schedule 1 to the *Guardianship Regulations 2005* (NSW).³

The document must be signed by you and accepted and signed by your enduring guardian(s).⁴

All signatures must be witnessed by a suitably qualified witness.⁵

It must be certified that all signatures were voluntary and that the persons signing understood the effect of the document.⁶

More than one enduring guardian

You may appoint more than one enduring guardian.⁷

Appointing guardians to act "jointly" means to act and make decisions together, and only by agreement.

Appointing guardians to act "severally" means to act and make decisions separately and independently of each other, without needing to obtain the agreement of any other guardians.

If they are appointed to act "jointly and severally", unless otherwise provided in the document, they may act jointly *or* severally, and the loss of one enduring guardian does not terminate the guardianship of the others.⁸

You may give different powers, duties, or responsibilities to each enduring guardian, in which case they are taken to be appointed "severally".⁹

Unless the document states otherwise, if the enduring guardians are appointed to act "jointly", the loss of one enduring guardian will terminate the enduring guardianship.¹⁰ However, if this is what

¹ Sn 6B

² Sn 6

³ Sn 6C(1)(a)

⁴ Sn 6C(1)(b)&(c)

⁵ Sn 6C(1)(d)

⁶ Sn 6C(1)(e)

⁷ Sn 6D

⁸ Sn 6D (2)

⁹ Sn 6D (3)

you wish to occur, then due to the contents of section 6D(6)-(8) you should specifically state this in the document.

Substitute guardian

You may appoint an alternative enduring guardian, who, unless stated otherwise in the document, will only be appointed as an enduring guardian on the loss of any other enduring guardian.¹¹

The appointment must be accepted by the alternative enduring guardian, and witnessed and certified in the same manner as the appointment of an enduring guardian.¹²

Scope of power

The appointment only has effect at such times as you are “in need of a guardian”.^{13 14}

Depending on the content of the document, your enduring guardian(s) will be able to decide where you live, decide what healthcare you receive, decide what personal services you receive, give consent to medical or dental treatment, and perform any other functions relating to "your person" specified in the document.¹⁵

You can place any conditions or limitations on your 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.¹⁶ You can extend (as well as restrict) the authority of your enduring guardian(s) by specifically stating so.¹⁷

Your enduring guardian(s) is/are authorised by the act to, on your behalf “sign and do all such things as are necessary to give effect to any function of the enduring guardian.”¹⁸

Marriage

The appointment of your enduring guardian(s) is automatically revoked by marriage.¹⁹

¹⁰ Sn 6D (4)&(5)

¹¹ Sn 6DA

¹² Sn 6DA(2)&(5), 6C(1)(d)

¹³ Sn 6A

¹⁴ “**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.” - Sn 3(1)

See 3(2) for the definition of a person who has a disability – it essentially means "restricted in one or more major life activities to such an extent that he or she requires supervision or social habilitation."

¹⁵ Sn 6E(1)

¹⁶ Sn 6E(2)&(3)

¹⁷ Sn 6E(1)(e)

¹⁸ Sn 6F

¹⁹ Sn 6HA

Resignation by your enduring guardian(s)

Your enduring guardian(s) may resign their appointment by giving written notice to you at any time that you are not in need of a guardian, or otherwise with the approval of the Guardianship Tribunal.²⁰

The notice must be in writing.²¹

The notice must be to the effect of the form contained in schedule 3 to the *Guardianship Regulations 2005* (NSW).²²

The notice must be signed by the enduring guardian who is resigning.²³

The signature must be witnessed by a suitably qualified witness.²⁴

Review

The appointment of your enduring guardian(s) can be reviewed by either the Guardianship Tribunal or the Supreme Court. This power of review includes the power to confirm or revoke the appointment of your enduring guardian(s), and the power to substitute an alternative enduring guardian where one of your enduring guardian(s) is not willing or able to act as your guardian.²⁵

An application may be brought by any person who “has a genuine concern for the welfare of the appointor”.²⁶

When making orders, the tribunal must have regard to the principles set out in section 4 of the Act.²⁷

Questions of capacity

If there is a question as to whether a person is in need of a guardian, this is usually resolved by obtaining a medical opinion on that issue.²⁸ However, where there is a difference of opinion this can be determined by the Tribunal.²⁹

Guardianship orders

The Supreme Court and the Guardianship Tribunal have extensive powers to order the appointment of a Court appointed guardian, and with respect to that appointment.³⁰ An application for a

²⁰ Sn 6HB(1)

²¹ Sn 6HB(1)(a)

²² Sn 6HB(2)(a)

²³ Sn 6HB(2)(b)

²⁴ Sn 6HB(2)(c)

²⁵ Sns 6J-6O, see esp Sns 6K, 6M, and 6MA

²⁶ Sn 6J(1)(b)

See section 3F for persons who are parties to proceedings, depending on the type of proceedings.

²⁷ See pg 1 for content of Sn 4

²⁸ Sn 6N

²⁹ Sn 6K(1)&(2) and Sn 6M

³⁰ Sns 7-25U

guardianship order may be brought by you, the Public Guardian, or “any other person who, in the opinion of Tribunal, has a genuine concern for the welfare of the person.”³¹

If a guardianship order is made the authority of your appointed enduring guardian(s) will be suspended for the duration of the order.³²

Directions

A guardian may seek directions from the tribunal if they are unsure how to discharge their duty.³³ A copy of any such request must be given to you and the Public Guardian.³⁴ In making a direction the tribunal must consider your views and your enduring guardian(s) views, as well as preserving existing family relationships.³⁵ Your enduring guardian(s) is/are protected against liability for breach of duty by obtaining such a direction.³⁶

Medical and dental treatment

The provisions of the Act relating to Medical and Dental Treatment apply to both an enduring guardian and a Court appointed guardian.

The purpose of empowering a guardian to consent to medical and dental treatment is to ensure that beneficial treatment is given.³⁷

Non-intrusive diagnostic examinations, first-aid treatment, or administering non-prescription drugs is not, for the purposes of the Act, medical or dental treatment, and accordingly is not subject to the specific requirements relating to medical and dental treatment but instead falls under the general principles of guardianship.³⁸

“Special treatment” is treatment that would render you permanently infertile or treatment that is not widely supported (unconventional)³⁹, treatment that involves the administration of a drug addiction over a sustained period (unless you are suffering from cancer or are terminally ill), abortion, "vasectomy or tubal occlusion", and "aversive stimulus" treatment such as "shock treatment", and accordingly is subject to stricter control under the Act.⁴⁰

³¹ Sn 9

³² Sn 61

³³ Sn 26

³⁴ Sn 27

³⁵ Sn 28(2)

³⁶ Sn 30

³⁷ Sn 32

³⁸ Sn 33

³⁹ Sn 33

⁴⁰ Reg 8

- Ability to consent to medical or dental treatment

You are incapable of giving consent to medical or dental treatment if you cannot understand the general nature and affect of the treatment or indicate whether or not you consent to that treatment.⁴¹

If you indicate by any means that you do not want the treatment to be carried out then you are taken to object to the treatment unless you subsequently indicate that you do not object.⁴²

- Who can decide for you

In the event your enduring guardian (or a court appointed guardian) declines or is unable to make a decision as to treatment, the person that may make that decision is your current spouse, failing that the person who is responsible for your care⁴³, and failing that a close friend or relative.⁴⁴ This is particularly important if you no longer have any enduring guardian(s) , or if the appointments have been revoked by marriage or otherwise terminated.

Consent to treatment in a clinical trial, or “Special Treatment”, may only be given by the Guardianship Tribunal or Supreme Court.⁴⁵

There are some limited circumstances in which treatment may be given without consent. Generally it must be urgent and necessary.⁴⁶

In order to consent the person, court, or tribunal, making the decision must be given information relevant to that decision, and must take account of that information and your views.⁴⁷ The Tribunal must conduct a hearing, and must also take account of your guardian(s) views.⁴⁸ Further, the tribunal must be satisfied the treatment is the “most appropriate form of treatment for promoting and maintaining the patient’s health and well-being” .⁴⁹

In the case of special treatment the tribunal must also be satisfied that it is “necessary: (a) to save the patient’s life, or (b) to prevent serious damage to the patient’s health”⁵⁰, or in the case of special treatment other than treatment that would render you permanently infertile, that “the treatment is the only or most appropriate way of treating the patient and is manifestly in the best interests of the patient” .⁵¹

⁴¹ Sn 33(2)

⁴² Sn 33(3)

⁴³ The term used, “Having the care of another person”, is defined in section 3D - essentially it includes providing domestic services and support as well as arranging for the provision of services and support, and a guardian does not stop having the care of another person simply because that person resides in an institution such as a nursing home.

⁴⁴ Sn 33A(4)&(5)

Section 3E defines “close friend or relative” - essentially it requires “a close personal relationship ... through frequent personal contact and a personal interest in the other person's welfare” without receiving remuneration or having a financial interest in the care of the person (not including a carer's pension).

⁴⁵ Sn 33, 35, & 36

⁴⁶ Sn 37

⁴⁷ Sns 40, 42 & 4

⁴⁸ Sn 44

⁴⁹ Sn 45(1)

⁵⁰ Sn 45(2)

⁵¹ Sn 45(3)

In order to approve a clinical trial the tribunal must be satisfied that the trial is for the treatment of your condition, does not involve substantial risk or more risk than current treatments, is safety wise and ethically appropriate, is in the best interests of the patients, and has been ethically approved. Consent still needs to be individually obtained for each participant in the trial.⁵²

- Limits to power

Any consent given is ineffective if the treatment is not for the purpose of “promoting or maintaining” your “health and well-being”.⁵³

Consent cannot be given by your guardian if you object to the treatment, unless you have “minimal or no understanding of what the treatment entails” *and* the treatment will *at worst* only cause “reasonably tolerable”, temporary distress.⁵⁴

The Tribunal may authorise your guardian to override your objection, but only if your objection would arise out of a “lack of understanding of the nature of, or reason for, the treatment”, and your guardian must be satisfied the treatment is “manifestly in the best interests” of you.⁵⁵

- Further reading

The regulations, and in particular Regulations 8 to 13 contain further details relating to the operation of guardianship, and in particular medical and dental treatment, including definitions of categories of treatment (such as special, major, or minor treatment). These regulations are important because they determine the type of consent (and from whom) that is required for the different procedures, including what procedures can be carried out without your consent in certain circumstances, and what procedures can only be consented to by the tribunal, or in writing. You should read through these regulations, and if you have any questions you should ask your solicitor. In the event your enduring guardian becomes necessary they should also refer to these regulations and the relevant sections of the act for guidance.

A copy of the act and regulations can be found at the following links:

Guardianship Act 1987 (NSW)

<http://www.legislation.nsw.gov.au/maintop/view/inforce/act+257+1987+cd+0+N>

Guardianship Regulation 2005 (NSW)

<http://www.legislation.nsw.gov.au/maintop/view/inforce/subordleg+426+2010+cd+0+N>

If you are concerned about any of these powers then you should consider placing directions and restrictions in the document appointing your enduring guardians and/or making an advance care directive.

⁵² Sn 45AA

⁵³ Sn 46(2)(b)

⁵⁴ Sn 46(2)(a)&(4)

⁵⁵ Sn 46A

Revoking the Appointment of an Enduring Guardian(s)

The appointment cannot be revoked if you do not understand the effect of doing so.⁵⁶

This will commonly mean that at the very time that a guardian is needed, you are no longer able to change your mind on who that will be.

The revocation of the appointment of your enduring guardian(s) must be done in writing.⁵⁷

The revocation document must be to the effect of the form contained in schedule 2 to the *Guardianship Regulations 2005 (NSW)*.⁵⁸

The revocation document must be signed by you.⁵⁹

The signature must be witnessed by a suitably qualified witness.⁶⁰

It must be certified that your signature was voluntary and that you understood the effect of the document.⁶¹

Written notice must be given to the guardian whose appointment is being revoked.⁶²

Questions and further information

If you have any questions that have not been addressed by this document, or any other questions, please do not hesitate to contact me.

⁵⁶ Sn 6H(2)(a)

⁵⁷ Sn 6H(1)

⁵⁸ Sn 6H(2)(b)

⁵⁹ Sn 6H(2)(c)

⁶⁰ Sn 6H(2)(c1)

⁶¹ Sn 6H(2)(c2)

⁶² Sn 6H(2)(d)

Some specific things to think about

Why do you want/need to appoint an enduring guardian?

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

What *don't* you want/need your enduring 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 enduring guardian(s)?

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