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Information Sheet – Appointment of Enduring Guardian

What is an enduring guardian?

An enduring guardian is someone you appoint to make personal or lifestyle decisions (including health care decisions) on your behalf when you are not capable of doing this for yourself. The ability to appoint an enduring guardian comes from the provisions of the *Guardianship Act 1987* (NSW). This Act details the requirements and other matters relating to the appointment of enduring guardians. An appointment of an enduring guardian is different to an Enduring Power of Attorney - a person appointed as attorney under an Enduring Power of Attorney has the authority to deal with your property and financial affairs if you lose mental capacity, but not personal or lifestyle decisions. As such, the making of an Enduring Power of Attorney complements the appointment of an Enduring Guardian and the two documents are often made together.

Who can appoint an enduring guardian?

If you are over 18 years, you can appoint an enduring guardian. At the time you appoint an enduring guardian, you must have the mental capacity to understand the effect of the appointment.

Who can be an enduring guardian?

The person you appoint as your enduring guardian must be at least 18 years old and should be someone you trust to make decisions in your best interests. The appointed enduring guardian cannot be a person who, at the time of appointment:

- provides medical treatment or care to you on a professional basis including a relative of such a person; or
- provides accommodation services or support services for daily living on a professional basis including a relative of such a person.

What sort of decisions can an enduring guardian make?

The decisions an enduring guardian can make for you usually include the following:

- To decide where you live;
- To decide what health care you receive;

- To decide what other kinds of personal services you receive;
- To consent to the carrying out of medical or dental treatment for you (in accordance with Part 5 of the Guardianship Act 1987)

However, you can give your enduring guardian as many or as few functions as you like. You can delete the functions you do not want your enduring guardian to have and add others if you wish. For example, you can give them the power to decide on your health care but not where you live. You can also 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 you have specific wishes concerning the sort of health care you receive when you no longer capacity then you might want to consider making an Advance Care Directive (sometimes known as a 'Living Will') setting out what medical treatment you want or do not want if you don't have the capacity to convey your wishes at the relevant time. An Advance Care Directive can go into very precise details on treatment for a wide range of medical conditions if you wish.

We can provide you with some further information regarding Advance Care Directives if you are interested in putting one in place. If you were to make one then your enduring guardian should be given a copy. If you don't want to go to the trouble of making an Advance Care Directive but have certain particular wishes concerning medical treatment then you should at least make your enduring guardian aware of those wishes so your enduring guardian can fulfil those wishes if possible.

How many guardians can you appoint?

You can appoint one or more persons as enduring guardian. If you appoint more than one enduring guardian, you can appoint them to act jointly (the enduring guardians must agree on all decisions), severally (each enduring guardian can make decisions separately from the others), or jointly and severally (the enduring guardians can act together or separately).

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

How do you appoint an enduring guardian?

You need to complete the appointment of enduring guardian form as prescribed under the Guardianship Act. We can prepare the necessary form for you. The form has to be signed by:

- you or an eligible signer on your behalf
- the enduring guardian(s)
- a witness, who must be a solicitor.

What should I do with the appointment?

It is a good idea to keep the appointment form in a safe place. We can keep it in a safe custody packet at our office if you wish for no charge. It is a good idea to tell someone else where it is and, even better, give a copy to your enduring guardian.

When does it take effect?

The appointment of your enduring guardian takes effect only if you become unable to make your own personal or lifestyle decisions. Your enduring guardian may wish to seek the opinion of a medical practitioner about your capacity to make decisions before acting on your behalf. If there is any doubt about your capacity to make decisions, a medical practitioner may have to assess your capacity.

Can you change your mind?

While you are capable of making your own decisions, you can revoke the appointment of an enduring guardian. To do this, you need to complete a Revocation of Appointment of Enduring Guardian form and advise the enduring guardian in writing that their appointment has been revoked. Only the Guardianship Tribunal can make changes to the appointment if you have lost the capacity to do this for yourself.

What if someone is worried about what your enduring guardian is doing?

Anyone with a genuine concern for your welfare can apply to the Guardianship Tribunal for a review of the appointment if they feel that your enduring guardian is not making appropriate decisions on your behalf. The Tribunal can revoke the appointment or confirm it. It may also change the functions in the appointment or make a guardianship order.

The Tribunal does not supervise enduring guardians. It will act only if it receives an application from a concerned person or receives information which leads it to review the enduring guardian appointment.

What happens if your enduring guardian cannot continue?

If the person you have appointed dies, resigns or becomes incapacitated and you haven't provided for an alternative enduring guardian, the Guardianship Tribunal can, in limited circumstances, order another person to be appointed as enduring guardian on your behalf. Someone will need to lodge an application on your behalf.

When does enduring guardianship end?

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

Further Advice

If you have any queries or wish to seek advice in relation to the Appointment of an Enduring Guardian, please feel free to contact us by phone of 9181 5764 or by email to tom@bealelawyers.com.au