

# Enduring Guardianship in New South Wales

Your way to plan ahead

Revised March 2017



Justice  
Public Guardian

This revised version replaces the 2014 edition. This booklet reflects the changes determined by the Guardianship Regulation 2016 under the *NSW Guardianship Act 1987 (NSW)*.

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# 1. ENDURING GUARDIANSHIP – PLANNING FOR YOUR FUTURE

## 1.1 The importance of planning ahead

When people think about the future they generally take it for granted that they will be able to make their own decisions. Many people plan ahead for their future by making a Will but do not consider what will happen if they find themselves unable to make day to day decisions due to illness or accident.

If you are unable to make your own decisions because of a temporary or permanent loss of capacity, you cannot always be sure that family and friends or informal support networks will be able to make important decisions on your behalf.

Talking to significant people in your life about what you want is wise so they know what your will and preferences are for your future. This is particularly important if there is potential for conflict around decisions that are being made for you.

You can plan ahead for your future health, legal and financial decisions by:

- appointing an Enduring Guardian to making decisions about your health and lifestyle if you cannot
- making an Enduring Power of Attorney to manage your financial affairs if you are unable to do so
- preparing an Advance Care Directive to inform others of treatment you may or may not wish to receive if you cannot state this for yourself
- making a Will to direct how your estate will be distributed according to your wishes on your death.

If you do not have planning ahead documents prepared when they are required, a court or tribunal may need to appoint someone to make decisions for you. The opportunity to choose who you would like to act on your behalf will be lost.

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*A solicitor or the government agency NSW Trustee & Guardian can help you prepare planning ahead documents. There is information about this in the ‘Where to get more information’ section at the end of this booklet.*

## 1.2 What is capacity?

Capacity means a person's ability to understand and appreciate the significance of the decisions they are making. The law in NSW assumes everyone has capacity to make their own decisions unless there is evidence that they have lost capacity to do this.

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

It is also important that you understand that you can revoke the appointment and make another appointment at any time provided you continue to have capacity to make this decision.

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## 1.3 Why appoint an Enduring Guardian?

The *Guardianship Act 1987* (NSW) makes it possible for you to appoint an Enduring Guardian. An Enduring Guardian is a substitute decision-maker of your choice with legal authority to make health and lifestyle decisions on your behalf if needed, such as deciding where you live, the services you need, what health care you receive, or consenting to medical and dental treatment on your behalf.

An Enduring Guardian legally appointed by you should consider your views both past and present. The Enduring Guardian should also consider the views of professionals and other people important in your life, take into account the circumstances existing at the time, then make decisions on your behalf should the need arise.

The Enduring Guardian's powers only come into effect and remain while you lack capacity to make decisions.

### CASE STUDY

Olga is an elderly widow diagnosed as being in the early stage of dementia. Olga has two sons. Her oldest son Michael lives interstate and has little contact with her. Her younger son James lives nearby and visits regularly. She feels James has a good understanding of her wishes and preference to live at home for as long as she is able.

Olga knows her son Michael thinks she should be in a nursing home and her house should be sold. She decides to talk to her doctor about appointing her Enduring Guardian and the decisions she thinks will need to be made in the future. Olga decides to appoint her son James as her Enduring Guardian. Olga knows that the authority she gives James will come into effect if she loses capacity to make these decisions for herself.

Olga also appoints James with an Enduring Power of Attorney to give him the legal authority to manage her pension and other assets such as her home.

## 1.4 Who can appoint an Enduring Guardian?

You need to be 18 years or older and have capacity to make a decision about who you wish to appoint as your Enduring Guardian.

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## 1.5 Who can you choose as your Enduring Guardian?

The person you appoint must be 18 years or older. Given the important nature of this decision making role, it is essential the person you appoint understands their responsibilities as a substitute decision-maker. Your Enduring Guardian should be someone you trust to be able to take into account your views and previous lifestyle choices and to make decisions in your best interests.

When choosing your Enduring Guardian it helps to consider the person's:

- willingness to take on this voluntary role
- ability to make decisions in potentially difficult and emotional circumstances
- understanding of your needs, wishes, values and beliefs
- ability to be contacted when a decision needs to be made
- age and general health.

There are some people who are not eligible to be appointed as your Enduring Guardian.

You cannot employ someone to be your Enduring Guardian. Other people excluded are those who are paid to provide you with professional or administrative services, such as your GP, community nurse, solicitor or manager of an aged care facility. Relatives who provide you with a service for a fee cannot be appointed as your Enduring Guardian.

The exception is a person who cares for you and receives a Carers Allowance or Carers Payment.

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## 1.6 How do you appoint an Enduring Guardian?

If you wish to appoint an Enduring Guardian, you must sign a legal form of appointment. The form is included in the back of this booklet.

The person or people you appoint need to sign the form in front of an eligible witness to show that they understand what the appointment means.

## 1.7 Who is an eligible witness?

Only an Australian legal practitioner, Registrar of the Local Court, overseas legal practitioner, or approved officer from NSW Trustee & Guardian or Service NSW may witness your signature and the signatures of the people you appoint.

The witness cannot be the same person you appoint as your Enduring Guardian.

Things to consider when completing the form of appointment:

- All signatures on the form must be witnessed. This does not have to happen at the same time and place.
- The witness or witnesses must complete the section at the end of the form certifying that each person signed the form voluntarily and appeared to understand its effect.
- If your Enduring Guardian's signature is witnessed at a different time or by a different witness, they will need a separate witness certificate.

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## 1.8 What if you are unable to sign?

If you are unable to sign the form, you can instruct an eligible signer to sign the form for you. This must be done in your presence with an eligible witness.

An eligible signer must be 18 years or older and:

- not a person you will be appointing as an Enduring Guardian
- not a witness to the appointment.

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*You can appoint a person even if they cannot be there when your signature or other signatures are witnessed. For example, you can appoint a family member or friend who lives overseas or in another state or territory. They can sign the original appointment form separately as long as the witness is an 'eligible' witness.*



## CASE STUDY

George and Fran are married. George has been unwell for some time and Fran has been receiving the Carers Allowance to care for him at home. George decides to appoint Fran as his Enduring Guardian. Although Fran receives the Carers Allowance to provide support to George she is still eligible to be appointed as his Enduring Guardian.

### 1.9 What should you do with the form of appointment?

The Appointment of Enduring Guardian form is an important legal document. The original should be kept in a safe place, possibly where you keep other legal documents such as your Will and your 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.

A certified copy of a document includes a statement written on the copy to say that it is a true and accurate copy of the original. Registrars of the Local Court, or legal practitioners and Justices of the Peace can provide 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.

When you appoint your Enduring Guardian it may be a private arrangement between you and the person or people you appoint. However, it helps to think about who needs to be told about your Enduring Guardianship appointment, such as family members, friends or your doctor. If people involved in your life know who you have appointed, they will know who to turn to if a decision on your behalf needs to be made.

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*There is no requirement for an Enduring Guardianship or Enduring Power of Attorney to be registered in NSW. A Power of Attorney must only be registered with NSW Land & Property Information if you want your attorney to deal with any real estate you own in NSW.*

## 2. MAKING DECISIONS

### 2.1 What sort of decisions can your Enduring Guardian make?

Your Enduring Guardian can only make decisions on your behalf about your health and lifestyle. You must choose the functions (decision making areas) you give to your Enduring Guardian.

The most common functions are already included on the specific form of appointment. These are:

#### **Accommodation – to decide where you live**

This function gives your Enduring Guardian the authority to decide where you should live permanently, or stay temporarily. This can include decisions about respite (in an aged care facility, group home or health care facility), holidays or overnight visits. It is not possible for your Enduring Guardian to consent to you moving against your wishes. This authority must be given by the Guardianship Division of New South Wales Civil & Administrative Tribunal (NCAT) and is usually referred to as a 'coercive' accommodation function in the guardianship order.

#### **Health Care – to decide what health care you receive**

This function gives your Enduring Guardian authority to consent to health care services such as dental or podiatry, as well as assessments by specialists such as a geriatrician or psychiatrist. This function also gives authority to your Enduring Guardian to change your doctor and make decisions about end of life treatment such as palliative care.

#### **Services – to decide what personal services you should have to support and assist you**

With this function your Enduring Guardian can consent to, and make decisions about the services you may need including:

- direct personal or attendant care
- house cleaning, shopping and other domestic support services
- counselling and therapy services
- employment, training, vocational or educational services
- social and recreational services
- case management
- assessment and review of service plans.

## **Consent to medical and dental treatment – to give or withhold consent to medical and dental treatment on your behalf**

With this function, medical and dental practitioners must seek substitute consent from your Enduring Guardian for proposed treatment if you cannot provide your own consent.

Your Enduring Guardian can consent to most medical and or dental treatment provided the treatment maintains or promotes your health and lifestyle, in accordance with Part 5 of the *Guardianship Act 1987* (NSW). 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. This authority must be given by the Guardianship Division of NCAT.

### **Other functions**

Some situations are more complicated and may need another function to give your Enduring Guardian the authority to make other types of decisions if needed. One example is an access function.

### **Access – to decide who you should have contact with**

The access function gives your Enduring Guardian authority to make decisions about who you want to have contact with. Access decisions may also include when, where, how and if such contact would be in your best interests.

It could be useful if you think there may be conflict about who expects to have contact with you. You may have a need to set some limits on how or when this applies to particular family members or friends.

## **CASE STUDY**

June had a difficult but important relationship with her friend Alan for many years. June was concerned that if she lost capacity she would no longer be able to set limits with Alan about when and how often he visited her.

After talking over her views and wishes with her sister Brenda, Brenda has a good understanding about the issues. They agree she would be the best person to make an access decision on June's behalf.

June appoints Brenda as her Enduring Guardian and includes the function of access in the form of appointment. June includes a direction that Brenda can make decisions about how and when she would have contact with Alan.

## 2.2 What directions can you give to your 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 professionals 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.

For example, in your directions to your Enduring Guardian under a health care function you may state: 'Where possible I would like you to consult with my GP, Dr White.' Or under an accommodation function, state: 'Where possible I want to have holidays on the Gold Coast'.

You can also limit the authority of your Enduring Guardian by crossing out the functions that you do not wish them to have. This means your Enduring Guardian can have authority in one, some, or all of the functions listed on the form.

The options of giving directions or setting limits to your Enduring Guardian are included on the form of appointment.

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*You decide which functions or decision making areas to give your Enduring Guardian. You can delete the functions that you do not want your Enduring Guardian to have on the form of appointment.*

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## 2.3 Why not specify the decision you want your Enduring Guardian to make?

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.

By deciding what functions or decision making areas you want your Enduring Guardian to have, you allow your Enduring Guardian to take into account any unforeseen circumstances and give them the freedom to consider all options before making a decision in your interests. If you give your Enduring Guardian directions or set limits they are legally binding and it removes flexibility from the decision making process.

## CASE STUDY

Kiel is forty years of age. He has seen the new Bestever Nursing Home and thinks it would be the only nursing home he would ever want to live in if he had to. Kiel decides to appoint Mike as his Enduring Guardian and gives him authority to make an accommodation decision that directs Mike 'in the event that I need nursing home placement I authorise you to consent to the Bestever Nursing Home only'.

30 years into the future...Kiel has Alzheimer's dementia and complex care needs. Mike, as his Enduring Guardian, has been asked to make a decision about nursing home placement.

Mike is concerned that the Bestever Nursing Home is now not the best option for Kiel. The facility is not able to provide the specialist dementia care that Kiel requires. Mike does not want to consent to Kiel living there but the specific wording in the accommodation function given to him limits what he believes will be the best decision he could make on Kiel's behalf.

Mike decides to apply to the Guardianship Division of NCAT for a review of the wording in his Enduring Guardianship appointment so that he is able to consider all possible accommodation options before making the decision on behalf of Kiel.

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## 2.4 What decisions cannot be made by your Enduring Guardian?

You cannot appoint your Enduring Guardian to make any decisions that are against the law. For example, euthanasia is illegal in all states and territories of Australia.

Your Enduring Guardian cannot make a Will or alter your Will on your behalf. An Enduring Guardian cannot vote or consent to marriage on your behalf.

Your Enduring Guardian (if they have this function), can only consent to medical and dental treatment that will promote or maintain your health and wellbeing. Your Enduring Guardian cannot consent to medical or dental treatment on your behalf when you object to that treatment.

Authority to override your objection to treatment must be given by the Guardianship Division of NCAT.

Your Enduring Guardian cannot consent to treatment that is defined as special medical treatment. Only the Guardianship Division can consent to special treatment. Special treatment can include treatment which will terminate a pregnancy, involve aversive stimuli, is reasonably likely to make someone infertile, or any new treatment that has not yet gained the support of a substantial number of medical practitioners or dentists.

Contact the Guardianship Division for more information about substitute medical and dental consent.

## **2.5 How will your Enduring Guardian access information to make decisions on your behalf?**

Your Enduring Guardian has the same right to information about you as you do. This may be information held by private or government agencies including hospitals or disability service providers, and individuals, such as doctors and specialists. The release of, or access to relevant information about you to your Enduring Guardian should be provided if the information would assist in making informed decisions on your behalf.

For example, an Enduring Guardian with health care and medical and dental consent functions will require information about your health needs, medical condition and prescribed medication before they can provide substitute consent to treatment or make health care decisions on your behalf.

## 3. APPOINTING MORE THAN ONE ENDURING GUARDIAN

### 3.1 How to appoint more than one Enduring Guardian

You can appoint more than one Enduring Guardian as:

#### Enduring Guardians appointed jointly

You may appoint a number of people jointly to be your Enduring Guardians. 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.

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 guardian ends.

#### CASE STUDY

Jim wants to appoint Trevor and Nancy jointly as his Enduring Guardians and gives them the accommodation function. If Jim loses capacity in the future, he wants Trevor and Nancy to agree and act together on accommodation decisions. To do this, Jim will use one form of appointment, specify the decision making area and name Trevor and Nancy as his Enduring Guardians.

Jim confirms on the form that he does not want the Enduring Guardianship appointment to end if either Trevor or Nancy dies, resigns or becomes incapacitated.

#### Enduring Guardians appointed severally

You may appoint a number of people severally (meaning separately or independently) to be your Enduring Guardians. In this way your Enduring Guardians may have the same functions or have different functions. Appointing severally means that each guardian can make decisions without needing to agree and act together.

When appointing Enduring Guardians severally, your Enduring Guardianship appointment will automatically continue if one of your Enduring Guardians dies, resigns or becomes incapacitated.

## CASE STUDY

Rita wants to appoint her brothers Tony and Mario severally with different functions (decision making areas). Mario is appointed with the function of accommodation and Tony with the functions of health care and medical and dental consent.

While both brothers have different areas of decision making, Rita is confident that they can make decisions in her interest independent of each other. Rita feels there is no need for them to have to make the decisions jointly.

Rita also decides to appoint her friend Lisa as her Enduring Guardian severally with the function of services. Lisa knows Tony and Mario well. All three guardians understand that they are appointed with the authority to make separate substitute decisions independent of each other.

If any of her Enduring Guardians die, resign or become incapacitated then Rita (provided she still has capacity) can review who should have the function in their place.

If Rita loses capacity to make this appointment an application to the Guardianship Division of NCAT can be made to determine who will have this function if there is a need for a decision in this area.

## Enduring Guardians appointed jointly and severally

You may appoint a number of people jointly and severally to be your Enduring Guardians. 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.

## CASE STUDY

Lael appointed Joe and Amir as her Enduring Guardians jointly and severally with the functions of accommodation, health care, and medical and dental treatment. Lael knows that her Enduring Guardians can make these decisions together or independently if needed.

Amir has to travel overseas for his work so if he is unavailable and a substitute decision is needed Joe can still make decisions independently of Amir.

Lael included a statement in the form of appointment that she would like the Enduring Guardianship to continue even if one of the joint Enduring Guardians were to die, resign or become incapacitated.

Six years later Joe decides to resign from his appointment as Lael's Enduring Guardian. There was no need to make a new Enduring Guardianship appointment as Lael was happy for Amir to continue to be her only Enduring Guardian as indicated on the form of appointment.



## CASE STUDY

Gabriel appointed Don and Bruce as his Enduring Guardians jointly and severally with the same functions of accommodation and services.

When Don had a severe stroke Gabriel realised that Don would no longer be able to make decisions on his behalf. As his Enduring Guardians were appointed jointly and severally, Gabriel understood that Don's stroke did not affect Bruce's authority to make accommodation and service decisions.

Using this type of appointment the death, resignation or incapacity of one of the Enduring Guardians does not automatically terminate the appointment of the other Enduring Guardians.

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### 3.2 What to consider when you appoint more than one Enduring Guardian

There are a number of things you may wish to consider when deciding to appoint more than one Enduring Guardian:

- Decisions made by one Enduring Guardian are likely to affect the decisions made by another Enduring Guardian.
- Enduring Guardians appointed jointly are expected to work together and reach agreement on the decisions that need to be made.
- The people you appoint should have the ability to cooperate and communicate well with each other.
- Consider appointing an Enduring Power of Attorney, as health and lifestyle decisions can mean a financial decision is also needed.

There are different ways you can do this.

## CASE STUDY

Sophie was considering jointly appointing Robin and Eric as her Enduring Guardians. She has a great relationship with Robin and Eric, but is concerned that Robin and Eric don't really like or communicate well with each other. The potential for conflict and disagreement between Robin and Eric may affect how decisions are made, Sophie has decided to appoint Robin as her Enduring Guardian and Eric as her substitute Enduring Guardian. Eric will only act as Sophie's Enduring Guardian if Robin resigns, dies or becomes incapacitated.

Sophie decides to appoint NSW Trustee & Guardian with an Enduring Power of Attorney to ensure there is an authority for a financial decision alongside any decision made by her Enduring Guardians.

### 3.3 Can I appoint a substitute Enduring Guardian?

You may appoint a substitute Enduring Guardian. If you do, the substitute Enduring Guardian will only have authority to act if the original Enduring Guardian dies, resigns or becomes incapacitated.

The substitute Enduring Guardian must sign the appointment form before an eligible witness to show they understand and accept the appointment.

#### CASE STUDY

Ahn decides to appoint his partner Lee as his Enduring Guardian with the functions of accommodation, health care, medical and dental consent and services, however Lee is a few years older and in the event that Lee loses capacity before Ahn, he decides to appoint his younger sister Rose as his substitute Enduring Guardian. Rose is willing to be the substitute Enduring Guardian and understands that this will only take effect if Lee resigns, dies or becomes incapacitated.

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### 3.4 What if your only Enduring Guardian dies, resigns or becomes incapacitated and you have not appointed a substitute Enduring Guardian?

Under the *Guardianship Act 1987* (NSW) a 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'.

The Guardianship Division of NCAT may take its own action to appoint a substitute guardian if there is a need or when an application is made to the Guardianship Division from anyone who has a genuine concern for your health and welfare and a substitute decision is needed. If it is not clear who else you would have appointed for yourself the Guardianship Division can appoint a guardian and a financial manager if there is no Enduring Power of Attorney.

A person who can be considered as guardian under the *Guardianship Act 1987* (NSW) will be someone who in the opinion of the Guardianship Division, 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.

## 4. THINGS TO CONSIDER

### 4.1 When can your Enduring Guardian start making decisions?

The appointment of your Enduring Guardian takes effect only if you lose the capacity to make your own health or lifestyle decisions.

Remember your Enduring Guardian can only make a decision under the function(s) given to them.

#### CASE STUDY

Jake is 29 years of age. He appointed Caleb four years ago to be his Enduring Guardian to make decisions about his health care, medical treatment and services. During this time there was no need for Caleb to make any decisions on Jake's behalf. Recently, Jake was in a serious car accident and suffered a severe brain injury.

Jake is now not able to make his own decisions. During this time Caleb has been active in his role as Jake's Enduring Guardian making decisions about health care, medical and dental issues and services as Jake goes through rehabilitation.

If Jake were to regain his capacity to make his own decisions in these areas, then Caleb would no longer have authority to make any new decisions.

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### 4.2 Who decides when you have lost capacity?

In some cases it will be clear that a person has lost capacity and is unable to make decisions for themselves, for example, in cases of severe illness or accident.

In other cases the decision about whether a person has lost capacity to make their own decisions is less clear. For example, a person with dementia may vary in their decision-making capacity or a person diagnosed with a mental illness may have episodes which affect their ability to make their own decisions.

If there is concern or disagreement over a person's capacity to make their own decisions, the *Guardianship Act 1987* (NSW) states that a medical certificate may be needed to establish whether the Enduring Guardian can use their authority.

Some situations are more complex. There may be strong disagreement about the person's capacity to make decisions which is not resolved by a thorough medical assessment and certificate, or the Enduring Guardian may not want to use their authority before it is necessary for them to be involved. In these circumstances it is possible for the Enduring Guardian to apply to the Guardianship Division of NCAT for an order declaring that the appointment of the Enduring Guardian has effect.

## CASE STUDY

Beryl appointed her daughters Jean and Susan jointly as her Enduring Guardians with accommodation, services and health care functions. Three years later Beryl was diagnosed with dementia. Jean and Susan disagree about their mother's capacity to make her own decisions about the services she receives at home.

Jean believes Beryl's dementia has progressed so far that her appointment as her mother's Enduring Guardian should now take effect and she should start making decisions on Beryl's behalf.

Susan acknowledges that her mother's condition is getting worse but she feels her mother can still make her own decisions. Jean and Susan request that their mother's doctor assesses Beryl's capacity to make her own decisions. Following the assessment the doctor confirms that Beryl lacks capacity to make her own decisions about what services she needs.

Susan is satisfied that the issue of their mother's capacity to make her own decisions has been properly investigated, and she and Jean can begin to make decisions in their mother's interest as her Enduring Guardians.

## CASE STUDY

Harry is diagnosed with a chronic mental illness. He is usually well but there are times when he can be acutely unwell. When Harry had capacity he appointed Wassim as his Enduring Guardian with the accommodation function. Wassim believes Harry is currently unwell and not able to make decisions about where he should live as Harry is threatening to give up his tenancy but has no other place to live. Wassim is unsure whether or not he can start making decisions to keep Harry's accommodation on his behalf.

Wassim applies to the Guardianship Division of NCAT for an order to declare that his appointment as Enduring Guardian can take effect. The Guardianship Division holds a hearing to consider information gathered from Harry, Wassim, Harry's family, his doctors and any other professionals involved. The Guardianship Division is satisfied that Harry is in need of a guardian and makes an order declaring the appointment of Wassim as Harry's Enduring Guardian has effect.

When Harry is considered stable and has capacity to make his own accommodation decisions, Wassim will no longer have this authority.

### 4.3 What guides the decision making of an Enduring Guardian?

An Enduring Guardian responsible for making personal, health and lifestyle decisions should refer to the principles of the *Guardianship Act 1987* (NSW). These principles aim to protect the rights of a person who cannot make decisions for themselves and may be used to weigh up how decisions can be made in the interests of the person who has appointed an Enduring Guardian.

Making decisions that are in keeping with these principles may not be as easy as it looks. In practice, some principles may conflict with others. For example, it may be difficult for the Enduring Guardian to ensure that the decisions they make allow you the freedom of action to do what you want, yet at the same time protect you from abuse, neglect and exploitation.

Finding a balance between these rights is the key, and requires the Enduring Guardian to think carefully about the consequences of a decision, weigh up alternatives, seek information about the current situation, gain an understanding about the importance of family and culture and in particular, what your own preferences may have been had you been able to make the decision for yourself.

Before the Enduring Guardian makes a decision on your behalf they will need to ask many questions to be sure about the options available.

Sometimes, in order to achieve the most appropriate and acceptable outcome for you, the Enduring Guardian will need to advocate for alternative options to meet your needs.

**The principles of the *Guardianship Act 1987* (NSW) are:**

- The welfare and interests of the person should be given paramount consideration.
- The freedom of decision and the freedom of action of the person should be restricted as little as possible.
- The person should be encouraged as far as possible to live a normal life in the community.
- The views of the person should be taken into consideration.
- The importance of preserving the family relationships and the cultural and linguistic environment of the person should be recognised.
- The person should be encouraged as far as possible to be self reliant in matters relating to personal, domestic and financial affairs.
- The person should be protected from abuse, neglect and exploitation.
- The community should be encouraged to apply and promote these principles.

## 4.4 Does anyone supervise your 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 their role in making decisions on your behalf.

If there is a concern about the actions or lack of action of an Enduring Guardian this can create a need to review the appointment.

Any person who has a genuine concern for your welfare can request the Guardianship Division of NCAT review the appointment of your Enduring Guardian. In reviewing the appointment of an Enduring Guardian, the Guardianship Division may revoke or confirm the appointment, or vary the functions of the appointed Enduring Guardian. The Supreme Court may also review the appointment of an Enduring Guardian.

If the Guardianship Division decides to revoke the appointment of your Enduring Guardian, it can appoint a different guardian under a guardianship order.

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*If a private guardian or the Public Guardian is appointed by the Guardianship Division the authority of the Enduring Guardian is automatically suspended for the duration of the guardianship order.*

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## 4.5 Will other states recognise my Enduring Guardian?

Other Australian states and territories have their own legislation governing Enduring Guardianship. Some automatically recognise a NSW Enduring Guardian appointment as legally valid. NSW automatically recognises Enduring Guardianship appointments or their equivalents made in other Australian states and territories.

## 5. ADVANCE CARE DIRECTIVES

### 5.1 Is Enduring Guardianship the same as an Advance Care Directive?

Enduring Guardianship is the legal form of appointment of a substitute decision-maker in areas concerning your general health and lifestyle.

An Advance Care Directive is a different document (sometimes referred to as a 'living will'). It should provide a clear statement setting out your directions, including your wishes and values, to be considered before medical treatment decisions are made on your behalf. Provided you have capacity to make these directions, Advance Care Directives can also outline what you prefer to have as the goals of any medical intervention if you cannot communicate this for yourself at a later time.

You cannot direct a doctor to treat you if it is not a medical option or if the doctor does not think the treatment would be beneficial.

While you have capacity you can contribute to the discussions with your family, partner, friends and doctor about what is important to you in general terms about the quality of life you want or in particular, when treating an illness or disease. This is called advance care planning.

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### 5.2 What is the legal effect of an Advance Care Directive?

There is no set form for you to record your Advance Care Directive but it will be considered legally binding if it has the following features:

- You make it while you have legal capacity.
- Your instructions are clear, specific and current.
- It reflects your wishes and there is no evidence that it was made as a result of undue influence.

Although not required, having an Advance Care Directive witnessed can add to its legitimacy.

If you take the time to discuss your Advance Care Directive with your Enduring Guardian then they should have a good understanding about what is important to you about your quality of life if there comes a time where you are unable to make these directions or decisions for yourself.

An Advance Care Directive can be attached to an Enduring Guardianship appointment. Alternatively, you can tell your Enduring Guardian where to find your separately written Advance Care Directive.

Further information about advance care planning is available from organisations listed in the 'Where to get more information' section at the end of this booklet.

## 6. MEDICAL AND DENTAL CONSENT

### 6.1 Who is your Person Responsible?

The term 'Person Responsible' is found in the *Guardianship Act 1987* (NSW) and is the legal term used to recognise who can provide consent to medical and dental treatment if you are unable to provide your own consent. The Person Responsible is not always the patient's next of kin.

The Guardianship Division of NCAT does not appoint the Person Responsible. The treating medical or dental practitioner has the legal responsibility to identify who can provide substitute consent to treatment if this is needed by referring to the hierarchy of Person Responsible.

Your Person Responsible is listed in order of priority. If there is no one in the first category, the treating practitioner must then look for someone in the second category and so on until the Person Responsible is identified.

The Person Responsible will be:

Your guardian or Enduring Guardian with a medical and dental consent function. If there is no one in this category then,

Your spouse, de facto spouse or same sex partner who has a close and continuing relationship with you. If there is no one in this category then,

Your carer or the person who arranges care regularly and is unpaid (the Carers Allowance does not count as payment), or your carer before you went into residential care. If there is no one in this category,

Your close friend or relative.

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### 6.2 What decisions can the Person Responsible make?

Your Person Responsible can provide or withhold consent to a range of medical or dental treatment. When your Person Responsible is acting on your behalf they have a right and a responsibility to access information to understand:

- the condition that requires treatment
- what treatment is proposed
- what are the risks and alternatives.



A Person Responsible can say yes or no to the proposed treatment and can seek a second opinion.

### Urgent treatment

Substitute consent does not have to be obtained if, in the opinion of the practitioner, medical or dental treatment is necessary as a matter of urgency to:

- save a person's life
- prevent serious damage to a person's health
- alleviate significant pain and distress.

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*The treating practitioner has a responsibility to give your Person Responsible information and seek consent to the treatment.*

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## 6.3 Is there anything the Person Responsible cannot do?

A Person Responsible cannot consent to:

- treatment that does not promote and maintain the person's health and wellbeing
- special medical treatment, such as sterilisation procedures, termination of pregnancy and experimental treatments\*
- treatment that overrides the person's objections.\*

\* Only the Guardianship Division of NCAT has authority to make decisions in these areas.

### CASE STUDY

Albert had been thinking about appointing an Enduring Guardian with a medical and dental consent function. He didn't get around to it. Albert later had an accident at work that left him unconscious. An ambulance was called and Albert received life-saving treatment at hospital. The urgent nature of this treatment meant the doctor did not need to seek consent. Albert made some improvement and was no longer dangerously ill. However, the injuries he received meant that he was unable to provide his own consent to ongoing treatment. The doctor saw the need to seek consent from Albert's Person Responsible and give Albert's Person Responsible the same information that would be needed to make a decision. Albert's wife Salmah told the doctor that Albert had not appointed an Enduring Guardian but the doctor recognised Salmah as the Person Responsible according to the hierarchy. Legally, Salmah can provide or withhold consent to the proposed treatment to Albert.

## 7. POWER OF ATTORNEY

Enduring Guardianship and Power of Attorney are separate legal documents with different functions.

### 7.1 What is a Power of Attorney?

A Power of Attorney is a legal document that appoints a person or trustee organisation (the attorney) to act on behalf of another person to manage their assets and financial affairs. For example, the attorney may be appointed with authority to buy and sell property, pay bills, collect rent and look after bank accounts. You must be over 18 years old and have capacity to make a Power of Attorney.

You can make either a General Power of Attorney or an Enduring Power of Attorney. The difference is that a General Power of Attorney ceases to have effect if you lose capacity, while an Enduring Power of Attorney continues to be in force after you have lost capacity to make decisions. A General Power of Attorney is useful for specific purposes such as if you are travelling and need someone to manage paying your bills while you are away.

An Enduring Power of Attorney may commence at the time it is made or at a later point in time, such as when a medical practitioner considers you are no longer able to manage your affairs or when your attorney believes you need assistance. The attorney can act for you while you still have capacity and the authority continues even if you should lose capacity to make your own financial decisions. This is usually the time when this authority is most needed.

The Enduring Power of Attorney has authority only when the person who is appointed has accepted this role by having the form of appointment signed and witnessed.

Witnesses for an Enduring Power of Attorney can only be an Australian solicitor or barrister, the Registrar of the Local Court NSW, a qualified overseas lawyer, an accredited employee of NSW Trustee & Guardian, a private trustee company or licensed conveyancer.

If you want your attorney to deal with any real estate you own in NSW the Power of Attorney, whether General or Enduring, must be registered with Land & Property Information. There is a fee for registration.

A Power of Attorney can be revoked (cancelled) at any time provided you have the capacity to do so. You should revoke the authority in writing and send this to the attorney and if it is registered, to NSW Land & Property Information. NSW Land & Property Information has a revocation form you may wish to use and it is available on its website [www.lpi.nsw.gov.au](http://www.lpi.nsw.gov.au)

## Other things to consider

An Enduring Power of Attorney or a General Power of Attorney cannot be used to authorise someone to provide medical consent or health or lifestyle decisions if you are no longer able to make these decisions for yourself.

You may choose to appoint the same person as your Enduring Guardian and your Enduring Power of Attorney. Or you may choose to appoint different people in these roles, jointly, jointly and severally or 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 are able to make decisions independently of each other.

If your Enduring Guardian is different to your attorney, you should ensure that each is aware of the other's appointment. They will need to talk to each other and co-operate if there is a need to make major decisions on your behalf.

Remember decisions made by your Enduring Guardian may have financial implications and the financial decisions made under an Enduring Power of Attorney may affect guardianship decisions.

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*Although you may have appointed someone to be your attorney under an Enduring Power of Attorney, this does not mean that you have given away your own right to make decisions in this area. While you have capacity, you can continue to make your own financial decisions, operate your bank accounts and deal with your property.*

## 8. CHANGING OR ENDING ENDURING GUARDIANSHIP

### 8.1 What happens if you change your mind?

It is possible to change your mind about whether you still want an Enduring Guardian or who you have appointed or the functions (decision making areas) you have given your Enduring Guardian.

To do this you revoke the appointment. This includes allowing you to alter the functions you gave to the Enduring Guardian or appoint a different person.

You must have capacity to do this. This means you must understand the nature and effect of the document you will sign revoking the appointment.

The revocation of an Enduring Guardian's appointment must be made in writing. There is a set form that you can use to do this. This form must be signed by you or by an eligible signer. The form is included in the back of this booklet.

Your signature must be witnessed by an Australian legal practitioner, Registrar of a Local Court, an approved overseas registered foreign lawyer or an approved employee of NSW Trustee & Guardian or Service NSW. There is no need for the person whose appointment you are revoking to sign this form. To complete the process you must notify the person in writing that you have revoked the appointment.

#### What if you get married?

The appointment of your Enduring Guardian is automatically revoked if you marry after the date on which you made the appointment. This does not apply if you marry the person you appointed.

#### CASE STUDY

Stavros and Elisabeth were friends. Stavros appointed Elisabeth as his Enduring Guardian. Five years later Elisabeth is living permanently overseas. Over time Stavros and Elisabeth have lost touch with each other. Stavros decides it would be better to have Gary, his new partner, as his Enduring Guardian. To do this Stavros must sign a form of revocation removing Elisabeth's appointment and have his signature witnessed. Elisabeth doesn't need to sign the form. Stavros sends Elisabeth a letter telling her this and attaches a photocopy of the form of revocation.

Stavros then completes a new form of appointment appointing Gary as his new Enduring Guardian; both have their signatures to the new appointment witnessed.

## 8.2 Can your Enduring Guardian resign?

Yes, your Enduring Guardian can resign from the role. If you still have capacity to make your own decisions and do not need a guardian, the Enduring Guardian can resign by putting this in writing and sending it to you.

If you have lost capacity to make this decision, then your Enduring Guardian can only resign with the approval of the Guardianship Division of NCAT.

There is a set form of resignation that the Enduring Guardian should use to do this. If the Enduring Guardian cannot sign, they may direct an eligible signer to sign on their behalf in their presence. The Enduring Guardian must sign the form before an eligible witness. A copy of this form is at the back of this booklet.

The same steps apply if a substitute Enduring Guardian wants to resign.

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## 8.3 When does Enduring Guardianship end?

Enduring Guardianship will end when:

- the person who appointed the Enduring Guardian dies
- it is revoked by the person who made the appointment
- the only Enduring Guardian resigns, dies or becomes incapacitated
- it is revoked by the Guardianship Division of NCAT or the Supreme Court.

A joint Enduring Guardianship appointment ends if one of the joint Enduring Guardians dies, resigns or becomes incapacitated, unless you have stated clearly in the form of appointment that you intend it to continue beyond these events.

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## 8.4 Who can review the appointment of your Enduring Guardian?

The Guardianship Division of NCAT can review the appointment of your Enduring Guardian at the request of any person who has a genuine concern for your welfare. This may be necessary where there is a significant change in your circumstances or because someone is concerned for your wellbeing due to the action or inaction of your Enduring Guardian.

If the Guardianship Division reviews the appointment of your Enduring Guardian it may:

- confirm the appointment
- revoke the appointment
- vary the functions (decision making areas) of the Enduring Guardian
- make a guardianship order.

In certain circumstances the Guardianship Division can confirm the appointment of an Enduring Guardian even if all the formal requirements for appointment have not been met. This may be when a person has announced his or her intention to appoint an Enduring Guardian but loses capacity before all the steps have been completed.

Only the Guardianship Division can make changes to the appointment if you have lost capacity.

## 9. PEOPLE WITH A DISABILITY

### 9.1 What happens if an Enduring Guardian is not appointed?

Having a disability does not always mean that a person lacks capacity to make their own decisions. Most people with disabilities will be supported by family members, partners, friends and formal services to make their own decisions. These important informal arrangements are known as supported or assisted decision making and should be recognised as the way to promote the rights and choices of a person who has a disability.

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### 9.2 What is supported decision making?

The United Nations Convention on the Rights of Persons with Disability highlights the importance of providing support for decision making for people living with a disability. It is essential to a person's quality of life, their health and wellbeing. Supported decision making ensures the person with a disability is at the centre of the decision making process and it is their will and preferences that drive decision making. They have a right to access the support they need to make decisions and have the opportunity to build their decision making confidence and ability. Supported decision making should always be tried before substitute decision making is considered.

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### 9.3 What decisions can be made without the need for a guardian?

Making health and lifestyle decisions for a person with a disability may not always need a legally appointed guardian provided the person with the disability is not objecting to the decision, the decision is consistent with their previous will and preference or values and the people involved in the process believe the decision made is in the person's best interests.

If you cannot provide your own consent to medical or dental treatment and do not object to the treatment, most decisions about medical and dental treatment can be made by your Person Responsible. See section 6 for more information on Person Responsible.

## CASE STUDY

Bill has an intellectual disability. He has family and friends who are supportive and involved in his life. Bill wants to move out of home to his own flat, one that is closer to the shops and his work, but he doesn't know how to go about doing this. Bill can't understand all of the paperwork from the real estate agent. Bill's case manager helps him to choose a suitable flat. Bill's sister Molly explains the paperwork is about his rights and responsibilities as a tenant. Bill indicates he is happy with the choice of flat and he moves there with the support of his case manager and his family. Together they have assisted Bill to make his own accommodation decision without the need for a guardian.

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### 9.4 When is there a need to apply for a guardian?

Sometimes a guardianship order might be necessary, for example, when:

- the person is objecting to medical treatment
- the person is objecting to being restrained or restricted in their daily life
- there is conflict among informal decision-makers about the decisions to be made
- there is no one to provide advocacy or support to assist the person in making their own decisions and a decision needs to be made.

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### 9.5 How is a guardian appointed?

Anyone with a genuine concern for the welfare of the person with a disability can apply to the Guardianship Division of NCAT. The application should include information about the person's disability, evidence to support the view the person lacks capacity to make their own decisions and there is a need for a decision.

The Guardianship Division will hold a guardianship hearing. The hearing will include the person with the disability, the person who made the application (applicant) and others important in the person's life.

The Guardianship Division will appoint, where possible, a family member or friend as the person's guardian. The Public Guardian is only appointed if there is no one able or willing to be appointed as guardian. This can include the situation where there is significant conflict over who should be appointed as guardian.

The Public Guardian is appointed for a limited time and with limited decision making areas.

## 10. SUPPORT FOR GUARDIANS

### **Making decisions is something we can take for granted but some decisions are more complex than others.**

When decisions about the health and or lifestyle of someone else need to be made, your Enduring Guardian or a guardian appointed for you might like to discuss concerns they have or seek advice on a complex matter.

There could be conflict or disagreement about what should be decided. Sometimes your Enduring Guardian may feel that they need more help and information but don't know where to find it.

The Public Guardian has a support unit for guardians called the Private Guardian Support Unit (PGSU). The unit provides free information, support and a referral service to legally appointed guardians. PGSU can assist guardians with any questions or concerns they have about their role.

The unit does not supervise the actions of guardians or tell them what decisions to make. Support and information can be provided to guardians in person, by phone, email and through regular newsletters.

Staff in the PGSU are employees of the NSW Public Guardian. The unit is independent of the Guardianship Division of NCAT and NSW Trustee & Guardian.

The details of any conversations between guardians and PGSU staff are confidential unless someone tells them a person is at risk or threatened with harm.

The PGSU produces a range of useful information on guardianship related matters which can be found on the Public Guardian's website or on request.



## 11. WHERE TO GET MORE INFORMATION

### Public Guardian

The Public Guardian can provide information on guardianship including fact sheets and free education sessions.

Information and Support Branch

**Phone:** 02 8688 6070

Private Guardian Support Unit

**Phone:** 02 8688 6060

**Toll free:** 1800 451 510

**Email:** [informationsupport@opg.nsw.gov.au](mailto:informationsupport@opg.nsw.gov.au)

**www.publicguardian.justice.nsw.gov.au**

### NSW Trustee & Guardian

NSW Trustee & Guardian can prepare your Will and Power of Attorney and act as your executor or attorney.

**Phone:** 1300 364 103

**www.tag.nsw.gov.au**

### Land & Property Information

Land & Property Information provides information about Powers of Attorney including registration and revocation.

**Phone:** 1300 052 637

**Email:** [generalenquiry@lpi.nsw.gov.au](mailto:generalenquiry@lpi.nsw.gov.au)

**www.lpi.nsw.gov.au**

### Guardianship Division of the NSW Civil & Administrative Tribunal

If a person does not have legal capacity or there are concerns about whether someone had capacity when an Enduring Guardianship or Power of Attorney was prepared, an application can be made to the Guardianship Division.

**Phone:** 02 9556 7600

**Toll free:** 1800 463 928

**TTY:** 02 9556 7634

**Email:** [gd@ncat.nsw.gov.au](mailto:gd@ncat.nsw.gov.au)

**www.ncat.nsw.gov.au**

### LawAccess NSW and Legal Aid NSW

LawAccess and Legal Aid can refer you to a lawyer or legal service.

**Phone:** 1300 888 529

**www.lawaccess.nsw.gov.au**

**www.legalaid.nsw.gov.au**

### Witnessing Enduring Guardianship appointments

To have an Enduring Guardianship witnessed you can visit:

- a solicitor
- NSW Trustee & Guardian
- the Registrar of a Local Court
- Community Legal Centres
- Service NSW

### Capacity, Advance Care Directives and planning ahead

For more information about Advance Care Directives, booklets, guidelines, advice and support there are a number of government and non-government agencies to contact:

NSW Department of Health

Using Advance Care Directives

**www.health.nsw.gov.au/patients/acp**

**Phone:** 02 9391 9000

Advance Care Planning Australia

**www.advancecareplanning.org.au**

Planning Ahead Tools

This NSW Government website provides helpful information and advice for future legal, health and financial decisions. It also links to other useful resources.

**www.planningaheadtools.com.au**

# NOTES

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## 12. FORMS

The following forms have been developed by the Public Guardian and NSW Trustee & Guardian.



**Appointment of Enduring Guardian(s)**

**Notice of Resignation as Enduring Guardian(s)**

**Revocation of Appointment of Enduring Guardian(s)**



## Important information to read before completing the Enduring Guardianship appointment form

- 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 a substitute enduring guardian\*, they will only have authority to act as your guardian if the first appointed enduring guardian/s 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 NSW Civil and Administrative 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 NSW Trustee and Guardian on **1300 364 103** or the NSW Civil and Administrative Tribunal Guardianship Division on **1300 006 228**.

\*previously referred to as alternate guardian



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.

# Appointment of Enduring Guardian

For New South Wales

(Guardianship Regulation 2016, 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.**

Complete this section if you wish to appoint a substitute guardian.

A substitute 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 a substitute guardian.

## 2. Optional – substitute guardian

I appoint *[substitute Enduring Guardian's name]*: \_\_\_\_\_

Of *[address]*: \_\_\_\_\_

Phone number: \_\_\_\_\_

Occupation: \_\_\_\_\_

**to be my substitute Enduring Guardian.**



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 agree and 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.



Enduring Guardian/s can only make health and lifestyle decisions. You should make an Enduring Power of Attorney if you want someone to make financial decisions on your behalf.

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).

## 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: \_\_\_\_\_

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to decide what health care I receive

Limits on authority of Enduring Guardian: \_\_\_\_\_

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to decide what other kinds of personal services I receive

Limits on authority of Enduring Guardian: \_\_\_\_\_

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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: \_\_\_\_\_

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to decide:

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**You and your Enduring Guardian can sign this page at the same time, in front of the same witness.**

**If your Enduring Guardian's 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 person must be over 18 years and must not be the person being appointed or the witness as described below.

The witness cannot be the Enduring Guardian, or a substitute Enduring Guardian.

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

Each Enduring Guardian must sign their acceptance on the appointment for it to be effective.

**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, *[your full name]*: \_\_\_\_\_

Of *[your address]*: \_\_\_\_\_

Phone number: \_\_\_\_\_

Occupation:  Australian legal practitioner

Registrar of the NSW Local Court

Overseas-registered foreign lawyer

Approved employee of NSW Trustee & Guardian/ Service NSW

**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 \_\_\_\_\_



**Note:**

Before the substitute 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 a substitute Enduring Guardian/s.

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

## 7. Optional – substitute Enduring Guardian’s acceptance and witness certificate

### 7a) Acceptance by substitute Enduring Guardian

*[Complete only if substitute Enduring Guardian appointed]*

I accept my appointment as Enduring Guardian.

Full name \_\_\_\_\_

Signature \_\_\_\_\_ Date \_\_\_\_\_

### 7b) Substitute 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 NSW Trustee & Guardian/Service NSW

**Certify that** \_\_\_\_\_

*[insert name of person accepting appointment as substitute Enduring Guardian]*

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

Signature \_\_\_\_\_ Date \_\_\_\_\_



**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 a substitute Enduring Guardian/s.

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

Your Enduring Guardian/s can resign at any time by giving you notice in writing. If you have lost capacity at that time, then your Enduring Guardian/s can only resign with the approval of the NSW Civil & Administrative Tribunal.

## 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 NSW Trustee & Guardian/Service NSW

**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 \_\_\_\_\_



**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 a substitute Enduring Guardian/s.

The witness must be an Australian legal practitioner/ Registrar of the NSW Local Court/overseas-registered foreign lawyer/approved employee of NSW Trustee & Guardian or Service NSW. 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 NSW Trustee & Guardian/ Service NSW

**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 \_\_\_\_\_



**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 9bb) below.

The witnesses cannot be the Enduring Guardian, or a substitute Enduring Guardian/s.

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

**9aa) 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 \_\_\_\_\_

**9bb) Additional 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 NSW Trustee & Guardian/Service NSW

**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 \_\_\_\_\_



## CHECKLIST

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

- 1. 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.
- 2. I trust my Enduring Guardian/s and have spoken to them about the kind of lifestyle decisions I wish them to make on my behalf should I lose capacity. If these change, I understand it is important to let my Enduring Guardian/s know.
- 3. 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.
- 4. I have considered the option in section 2 of appointing a substitute guardian should my first appointed Enduring Guardian die, resign or become incapacitated.
- 5. I have indicated how I wish my Enduring Guardians to act (i.e. jointly, severally or jointly and severally) by completing section 3.
- 6. 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.
- 7. I understand the certificate of witness needs to be completed by an eligible witness, i.e. an Australian legal practitioner/Registrar of the NSW Local Court/overseas-registered foreign lawyer/approved employee of NSW Trustee & Guardian or Service NSW.
- 8. I understand my Enduring Guardian/s need to sign their acceptance of the Enduring Guardian appointment before it can operate.
- 9. 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 attorney, and I will keep a copy in a safe place. There is no public register for Enduring Guardianship appointments.
- 10. I understand that if I marry, the Enduring Guardianship appointment will be revoked unless I am marrying my Enduring Guardian.
- 11. I understand it is advisable to get medical and legal advice before signing my Enduring Guardianship appointment.



**An Enduring Guardian can resign at any time by giving written notice in this form to the person who appointed the Enduring Guardian. However, an Enduring Guardian for a person who has lost the capacity to make personal decisions may only resign with the approval of the NSW Civil & Administrative Tribunal.**

**Appointor –**

The person who makes an Enduring Guardian appointment is known as the appointor.

**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 opposite. The witness cannot be the Enduring Guardian, or a substitute Enduring Guardian/s.

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

**Notice of Resignation as Enduring Guardian**

**For New South Wales**

(Guardianship Regulation 2016, Schedule 1)

I, *[your full name]*: \_\_\_\_\_

Of *[your address]*: \_\_\_\_\_

Occupation: \_\_\_\_\_

Phone number: \_\_\_\_\_

Date of birth: \_\_\_\_\_

**Resign** my appointment as an Enduring Guardian of *[appointor's name]*: \_\_\_\_\_

Of *[appointor's address]* \_\_\_\_\_

Having been appointed by an instrument of appointment dated \_\_\_\_\_ *[insert if known]*

Signature \_\_\_\_\_ Date \_\_\_\_\_

**Optional – signature on my behalf**

The Enduring Guardian instructed me to sign this resignation on their behalf.

Signature on behalf of Enduring Guardian \_\_\_\_\_

Date \_\_\_\_\_

Signer's full name \_\_\_\_\_

Signer's address \_\_\_\_\_

Signer's phone number \_\_\_\_\_

**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 NSW Trustee & Guardian/ Service NSW

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

\_\_\_\_\_  
*[insert name of Enduring Guardian resigning appointment]*

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

The Enduring Guardian resigning appointment voluntarily instructed *[insert signer's full name]*

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

Signature \_\_\_\_\_ Date \_\_\_\_\_

**Appointor –**

The person who makes an Enduring Guardian appointment is known as the appointor.

The appointor must have capacity in order to revoke the appointment of their Enduring Guardian.

**Note:** Before the appointor signs here they must arrange for a witness to watch them sign this form. The witness needs to complete their details opposite.

The witness cannot be the Enduring Guardian, or a substitute Enduring Guardian/s.

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

**For information contact the Guardianship Division of the NSW Civil & Administrative Tribunal**

**Phone 02 9556 7600 or 1300 006 228**

**Telephone typewriter 02 9556 7634**

**Fax (02) 9555 9049**

**Email: gd@ncat.nsw.gov.au**

**Website: www.ncat.nsw.gov.au**

# Revocation of Appointment of Enduring Guardian

For New South Wales

(Guardianship Regulation 2016, Schedule 1)



I, *[your full name]*: \_\_\_\_\_

Of *[your address]*: \_\_\_\_\_

Occupation: \_\_\_\_\_

Phone number: \_\_\_\_\_

Date of birth: \_\_\_\_\_

**Revoke** the appointment of *[insert the name of each Enduring Guardian]*

\_\_\_\_\_ as my Enduring Guardian/s.

I understand that this revocation will not be effective unless the Enduring Guardian has been given/is given written notice of the revocation.

Date of original instrument of appointment \_\_\_\_\_  
*[insert if known]*

Signature \_\_\_\_\_ Date \_\_\_\_\_

**Optional – signature on my behalf**

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

Signature on behalf of appointor \_\_\_\_\_

Date \_\_\_\_\_

Signer's full name \_\_\_\_\_

Signer's address \_\_\_\_\_

Signer's phone number \_\_\_\_\_

**Witness certificate**

I, *[your full name]*: \_\_\_\_\_

Of *[your address]*: \_\_\_\_\_

Phone number: \_\_\_\_\_

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

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

\_\_\_\_\_

*[insert name of appointor revoking appointment]*

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

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

\_\_\_\_\_ to sign the revocation on their behalf and that person executed the revocation in my presence.

Signature \_\_\_\_\_ Date \_\_\_\_\_







# RAISING COMMUNITY AWARENESS

The Public Guardian is committed to raising awareness about Enduring Guardianship and ensuring that people have information to plan ahead and appoint an Enduring Guardian of their choice.

The Public Guardian has a statutory responsibility to provide information to the community about the *Guardianship Act 1987* (NSW) and the role and responsibilities of guardians.

For a free information session, call Public Guardian Information Support on 02 8688 6070 or email [informationsupport@opg.nsw.gov.au](mailto:informationsupport@opg.nsw.gov.au)



## Public Guardian Information and Support Branch

160 Marsden Street  
Parramatta NSW 2150  
Locked Bag 5116 Parramatta 2124

**Phone** 02 8688 6070

**Toll free** 1800 451 510

**Fax** 02 8688 9797

**Email** [informationsupport@opg.nsw.gov.au](mailto:informationsupport@opg.nsw.gov.au)

