



## Enduring Guardianship

# Planning for your future health and lifestyle decisions

An Enduring Guardianship appointment is one of the four important ways to plan ahead:



Will



Power of Attorney



Enduring Guardianship



Advance Care Directive



When you appoint an Enduring Guardian

you know your future health and

lifestyle decisions will be made by

someone you trust.





# Contents

1. What is an Enduring Guardian .....	2
2. Why it is important to have an Enduring Guardian .....	2
3. How to appoint an Enduring Guardian .....	3
4. Decisions an Enduring Guardian can make .....	4
5. Appointing more than one Enduring Guardian .....	5
6. When the role of Enduring Guardian starts and finishes .....	6
7. Making decisions as an Enduring Guardian .....	7
8. Putting limits on what decisions an Enduring Guardian can make .....	8
9. Changing your Enduring Guardianship arrangements .....	8
10. Resignation of an Enduring Guardian .....	9
11. Concerns about an Enduring Guardian .....	9
12. Where to keep an Enduring Guardianship form .....	10
13. NSW Enduring Guardianship appointment in other states and territories .....	10
14. Support available for Enduring Guardians .....	11
15. Further information .....	11
16. Enduring Guardianship Checklist .....	12

The information in this book is not intended to be legal advice; it has been prepared for information only. Please speak to a legal professional before making important decisions.

© NSW Trustee & Guardian 2019

## Some of the key terms used in this guide:

### **Enduring Guardian**

Someone you appoint to make health and lifestyle decisions if you cannot. This could be because of injury, illness or disability.

### **Enduring Guardianship**

The legal process of appointing an enduring guardian(s) through a document.

### **Attorney**

Someone you appoint under a Power of Attorney to make financial and legal decisions on your behalf.

### **Capacity**

A person's ability to understand facts and make choices, weigh up information, understand consequences and communicate.

### **NCAT**

NSW Civil & Administrative Tribunal. NCAT's Guardianship Division makes decisions about people who have a decision making disability, including making guardianship and financial management orders.

### **Private Guardian**

A person appointed by the Guardianship Division of NCAT or the Supreme Court to be a substitute decision maker.

### **Public Guardian**

The Public Guardian is a NSW Government agency that can be appointed by the Guardianship Division of NCAT or the Supreme Court as the substitute decision maker of last resort.



## 1. What is an Enduring Guardian

An Enduring Guardian is a person you choose to make decisions about your health and lifestyle in the event you cannot make these decisions for yourself. It is a legal appointment. Your Enduring Guardian should be someone you trust such as a spouse, family member or friend.

In NSW your Enduring Guardian can only make decisions about your health and lifestyle. You can appoint someone under an Enduring Power of Attorney to make financial decisions on your behalf. This person is called an attorney and can be the same person as your Enduring Guardian.

## 2. Why it is important to have an Enduring Guardian

There may be a time in your life where you need someone to make important decisions for you. This could be due to a temporary or permanent loss of capacity. A loss of capacity can happen as a result of illness, injury or disability and can happen at any time in your life.

If you do not have an Enduring Guardian and decisions need to be made on your behalf, a court or tribunal may need to appoint someone to make decisions for you. The opportunity to appoint your own Enduring Guardian could be lost.





### 3. How to appoint an Enduring Guardian

You can appoint an Enduring Guardian as long as you are over 18, live in NSW and have decision making capacity.

It is essential the person you appoint:

- is willing to take on the role
- is able to make decisions in difficult and emotional circumstances
- understands your needs, wishes, values and beliefs
- is easy to contact when decisions need to be made
- understands they won't be paid.

You cannot appoint a professional person like your doctor or accommodation provider to be your Enduring Guardian. The exception to this is if the person is a carer who is receiving the Centrelink Carer's allowance. You also cannot appoint the Public Guardian as your Enduring Guardian.

To appoint an Enduring Guardian in NSW, you need to complete an Enduring Guardianship appointment form. Enduring Guardianship forms have to be witnessed by a specific category of people including:

- accredited staff from NSW Trustee & Guardian
- Australian and overseas legal practitioners (solicitors)
- Registrars of the Local Court.

NSW Trustee & Guardian or a private solicitor may use their own version of Enduring Guardianship forms.

#### GET ENDURING GUARDIANSHIP FORMS



Download at  
[www.publicguardian.justice.nsw.gov.au/forms](http://www.publicguardian.justice.nsw.gov.au/forms)



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



Call  
(02) 8688 6070  
or 1800 451 510

## 4. Decisions an Enduring Guardian can make

An Enduring Guardian only makes decisions in the areas you decide in your Enduring Guardianship document. These can include:

- ☒ where you live and the services you might receive
- ☒ health care, medical and dental treatment you receive.

### They can also:

- ☒ apply for extra decision making areas from the Guardianship Division of NCAT, if circumstances become more complex or there is a need for different decisions that can't be made informally with support. For example, if your Enduring Guardian only has the health care and medical decision making areas they may need to apply for the accommodation function if they need to make a decision about where you should live
- ☒ be consulted and make decisions during end of life stages, and advance care plans.

Enduring Guardians **cannot** make decisions about:

- ☒ your money
- ☒ who you vote for
- ☒ marriage on your behalf
- ☒ anything that is against the law
- ☒ saying 'yes' or 'no' to special treatments, which can include:
  - treatments that will prevent a person having children
  - terminating a pregnancy
  - aversive stimuli
  - new treatments not yet peer reviewed
- ☒ making or changing your advance care directive
- ☒ making or changing your Will.



## 5. Appointing more than one Enduring Guardian

You can appoint more than one Enduring Guardian, but you need to make it clear on your Enduring Guardianship appointment form how you want them to make decisions.

When you appoint more than one Enduring Guardian, your guardians will need to talk to each other. If you have an attorney they may also need to discuss how decisions will be made, as decisions in one area are likely to affect decisions in other areas.

You can appoint your Enduring Guardians to make decisions together (jointly), separately (severally) or both of these (jointly and severally).

### Substitute Enduring Guardian

You can appoint another person as a substitute Enduring Guardian who only makes decisions for you if your original guardian is no longer able to. Your substitute guardian(s) will also need to sign the forms in front of an eligible witness.

If you have not appointed a substitute, you no longer have capacity and your Enduring Guardian is no longer able to make decisions for you, anyone concerned for your welfare can make an application to the Guardianship Division of NCAT to decide who your guardian should be.



### LAEL'S STORY

*Lael is 33 years old and appointed Anh to be her Enduring Guardian four years ago. During this time there has been no need for Anh to make any decisions on Lael's behalf. Recently, Lael was in a serious car accident and suffered a severe brain injury. She is now unable to make her own decisions so Anh has become active in his role as her Enduring Guardian. If Lael regains capacity then Anh will no longer have authority to make decisions.*



### Jointly

Enduring Guardians have the same decision making areas and need to agree and act together when making decisions.

Make sure you have considered how you want your Enduring Guardians to make decisions if one is unable to carry out the role.



### Severally

Enduring Guardians can work separately with the same or different decision making areas. They can make decisions without needing to agree or act together.

Think about the possibility that Enduring Guardians can carry on making decisions if the other one(s) becomes unable to make decisions for you.



### Jointly and severally

Enduring Guardians are appointed with the same decision making areas and they can work together or separately when they make decisions for you.





## JUAN'S STORY

*Juan wants to appoint Trevor and Nancy jointly as his Enduring Guardians and give them the accommodation function.*

*If Juan loses capacity in the future, he wants Trevor and Nancy to agree and act together on accommodation decisions. To do this, Juan names Trevor and Nancy as his joint Enduring Guardians and gives them authority to make decisions about his accommodation, in the appointment form.*

*Juan 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. This means Trevor or Nancy, as remaining appointee, can make decisions alone.*

## 6. When the role of Enduring Guardian starts and finishes

An Enduring Guardian only starts making decisions for you when you are unable to. A doctor or specialist can be called on if it is uncertain whether your Enduring Guardian should start making decisions.

An Enduring Guardianship appointment continues for as long as you need it unless:

- you revoke it while you have capacity
- your Enduring Guardian resigns, dies or is unable to carry out the role
- the appointment is changed or revoked by the Guardianship Division of NCAT or the NSW Supreme Court.



## 7. Making decisions as an Enduring Guardian

Your Enduring Guardian needs to think carefully about decisions to ensure they promote your interests. The principles of the *Guardianship Act 1987* will guide their decision making.

They should consider the possible outcomes of their decisions, look at options, weigh up the alternatives and have a good understanding of your current situation.

This could mean talking to professionals and requesting information from health care and service providers to help them make decisions.

It is important that your Enduring Guardian thinks about what decision you would make if you were able to decide for yourself. They also need to be prepared to advocate for other options if what is available does not meet your needs.

### Principles of the Guardianship Act:



**The welfare and interests of the person should be given paramount consideration.**



**The freedom of decision and 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.**



### STEVEN'S STORY

*Steven appoints his friend Elisabeth as his Enduring Guardian. But after five years, Elisabeth is living overseas and the friends have lost touch. Steven decides it would be better to have his new partner Lisa as his Enduring Guardian instead. To do this, Steven signs a form of revocation removing Elisabeth's appointment and has his signature witnessed. Elisabeth doesn't need to sign the form. Steven sends Elisabeth a letter to let her know the new arrangement and attaches a copy of the form of revocation.*

*Steven then completes a new form to appoint Lisa as his Enduring Guardian; both have their signatures to the new appointment witnessed.*

## 8. Putting limits on what decisions an Enduring Guardian can make

Directions can be included in your Enduring Guardianship form to tell your Enduring Guardian how they should use their authority.

For example, you might direct them to seek advice from your doctor or specialists before they make certain decisions.

It's important to remember that directions or limits should be applied thoughtfully as they can remove flexibility in decision making.

**You can make or change an Enduring Guardian appointment as long as you still have decision-making capacity.**



## 9. Changing your Enduring Guardianship arrangements

You can revoke or change your Enduring Guardian at any time as long as you have decision making capacity. To revoke (cancel) your Enduring Guardianship appointment, complete the form available from the Public Guardian website and have it signed by an eligible witness.

When making any changes, it's important to communicate those changes with those around you so your close family and friends know your wishes. If you get married after appointing an Enduring Guardian, the appointment is automatically revoked unless you marry the person you appointed.

## 10. Resignation of an Enduring Guardian

If your Enduring Guardian has not started making decisions for you, they can resign by filling out the resignation form on the Public Guardian website. You can make a new Enduring Guardian appointment as long as you still have decision-making capacity.

If your Enduring Guardian is making decisions for you, they can only resign with the approval of the Guardianship Division of NCAT. This is so you are not left without a substitute decision maker when you need one. The Guardianship Division will then hold a hearing to decide who should be your new guardian.

## 11. Concerns about an Enduring Guardian

If anyone has concerns about your Enduring Guardian, they can make an application to the Guardianship Division of NCAT to have the appointment reviewed.

The Guardianship Division may decide to keep the current Enduring Guardianship arrangement in place, or they can appoint a different person as your private guardian or the Public Guardian as a last resort.

The Guardianship Division can make a decision to revoke the Enduring Guardianship order, or suspend the Enduring Guardian's authority for the term of the order.





## 12. Where to keep an Enduring Guardianship form

Your Enduring Guardianship is an important legal document which should be kept in a safe place.

*NSW Trustee & Guardian's Will Safe* provides secure storage for your Will, Power of Attorney and Enduring Guardianship documents and they can be easily accessed when needed.

In NSW you do not have to register an Enduring Guardianship document. It is recommended that you provide a copy to your appointed Enduring Guardian and other important people in your life.

## 13. NSW Enduring Guardianship appointment in other states and territories

Other Australian states and territories have their own guardianship laws and arrangements; some automatically recognise a NSW Enduring Guardianship appointment as legally valid.

NSW automatically recognises Enduring Guardianship appointments (or their equivalents) made in other Australian states and territories.

You can appoint someone who lives interstate or overseas as your Enduring Guardian as long as their signatures are witnessed and they are willing to be available to make decisions when the time comes.





## 14. Support available for Enduring Guardians

Enduring Guardians can contact the Public Guardian who have an information and referral service for private and Enduring Guardians.

The Public Guardian produce a range of materials designed to assist guardians in their role, including the quarterly Oguard newsletter. They also have a general information line and offer community education sessions about guardianship.

**Keep your Enduring Guardianship**

**form in a safe place like**

**NSW Trustee & Guardian's**

**Will Safe storage facility.**

## 15. Further information

### Public Guardian



02 8688 6070 or 1800 451 510

[www.publicguardian.justice.nsw.gov.au](http://www.publicguardian.justice.nsw.gov.au)

### NSW Trustee & Guardian

Prepares Wills, Powers of Attorney and Enduring Guardianship documents



1300 364 103

[www.tag.nsw.gov.au](http://www.tag.nsw.gov.au)

### NSW Department of Health



02 9391 9000

[www.health.nsw.gov.au/patients/acp](http://www.health.nsw.gov.au/patients/acp)

### Advance Care Planning Australia



1300 208 582

[www.advancecareplanning.org.au](http://www.advancecareplanning.org.au)

The information in this guide can be requested from the Public Guardian in other accessible formats including Braille, audiotape and large print.

**Make sure you speak to the important  
people in your life about your  
Enduring Guardianship decisions.**

## 16. Enduring Guardianship Checklist

- ☐ I have spoken with the important people in my life about this decision and have told them who I want to appoint as my Enduring Guardian.
- ☐ I trust my Enduring Guardian understands the role and is willing to make decisions for me.
- ☐ I have considered appointing a substitute Enduring Guardian(s).
- ☐ If I have appointed more than one person, I have outlined how I want my Enduring Guardians to make decisions for me (jointly/severally/jointly and severally).
- ☐ I understand I can ask someone to sign the form for me if I am unable to sign it myself and that this person can't be my Enduring Guardian or my witness.
- ☐ I understand that both my signature and my Enduring Guardian's signature need to be witnessed by either an Australian legal practitioner, Registrar of a local court or approved employee from NSW Trustee & Guardian.
- ☐ I plan to provide the form to those in my life who need to know about this decision like my family and my attorney, acting under a Power of Attorney.
- ☐ I understand that if I marry, the Enduring Guardianship appointment will be revoked unless I marry the person I appointed.
- ☐ I understand it is important to get medical and legal advice before signing the forms.





# Contact us

Public Guardian



+61 2 8688 6070  
or 1800 451 510



[www.publicguardian.  
justice.nsw.gov.au](http://www.publicguardian.justice.nsw.gov.au)