

Guardians

Estate Planning & Trusts  
**Enduring Guardians**  
A brief introduction



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## **WHAT IS AN ENDURING GUARDIAN?**

An enduring guardian ('the Enduring Guardian') is someone you legally appoint to make personal or lifestyle decisions for you when you are not capable of doing this for yourself.

You choose which decisions (the Functions') you want your Guardian to make and direct how they are to carry them out.

## **WHY APPOINT AN ENDURING GUARDIAN?**

We all prefer to decide for ourselves where we live and what medical treatment and services we have but unfortunately this is not always possible. Every day people are involved in accidents or become sick which sometimes lead to them being unable to make decisions for themselves.

By appointing an Enduring Guardian you choose who you want to make decisions for you if you lose the capacity to do this for yourself.

## **WHO CAN APPOINT AN ENDURING GUARDIAN?**

If you are over 18 years, you can appoint one or more people to be your Enduring Guardian(s). At the time you appoint an Enduring Guardian, you must have the mental capacity to understand what you are doing.

## **WHO CAN BE AN ENDURING GUARDIAN?**

The person you appoint as your Enduring Guardian must be:

- at least 18 years old
- someone you trust to make decisions in your best interests.

The Enduring Guardian cannot be a person who, at the time of appointment:

- provides medical treatment or care to you on a professional basis; or
- provides accommodation services or support services for daily living on a professional basis; or
- is a relative of one of the above.

## **HOW MANY GUARDIANS CAN I APPOINT?**

If desired you can appoint more than one Enduring Guardian but you should choose people who can cooperate with each other and who you trust to work together in your best interests. It is also important to consider their availability to make decisions on your behalf.

You can appoint your Enduring Guardians to act:



- (a) jointly and severally (this means that the Enduring Guardians can make decisions together or separately),
- (b) severally (this means that any one of the Enduring Guardians can make decisions independently of the other Enduring Guardian),
- (c) or jointly (the Enduring Guardians must agree and act on all decisions).

### **WHAT HAPPENS IF MY ENDURING GUARDIAN DIES OR CANNOT CONTINUE?**

Your appointment of Enduring Guardians may be affected if one of your Enduring Guardians dies or cannot continue in their role.

If you appointed them to act jointly and one of them is no longer willing or able to carry out their duties, then this will automatically end the appointment of all your Enduring Guardians. If you do not want this to happen, you will need to make it clear in the appointment form that the remaining Enduring Guardians can keep making decisions for you even if one of the original Enduring Guardians dies, resigns or becomes incapacitated.

If you appointed your Enduring Guardians to act jointly and severally or severally then the appointment of the Enduring Guardians will continue, even when one of them dies, resigns or becomes incapacitated.

### **WHAT HAPPENS IF I ONLY HAVE ONE ENDURING GUARDIAN WHO CANNOT CONTINUE?**

If the person you have appointed dies, resigns or becomes incapacitated, you can appoint someone else to be your Enduring Guardian. If you do not have the mental competence to do this, the Guardianship Tribunal can, in limited circumstances, order another person to be appointed as your Enduring Guardian.

Another way in which you can prepare for such an event is to appoint an Alternative Enduring Guardian who can act only if the original Enduring Guardians have died, resigned or become incapacitated.

### **WHAT DECISIONS CAN AN ENDURING GUARDIAN MAKE?**

Your Enduring Guardian must act in your best interests and within the principles of the Guardianship Act 1987.

You can give your Enduring Guardian as many or as few Functions as you like. You can also give your Enduring Guardians directions about how to exercise the Functions you give them. For example, you can direct your Enduring Guardians to consult with a particular close friend before making a decision.

### **WHAT DECISIONS CAN'T AN ENDURING GUARDIAN MAKE?**

An Enduring Guardian cannot consent to anything unlawful and cannot:

- make a will for you,
- vote on your behalf,
- consent to marriage,
- manage your finances, or



- override your objections, if any, to medical treatment.

An application must be made to the Guardianship Tribunal to authorise medical treatment overriding your objections.

If you strongly object to the Enduring Guardian's decisions, you or someone on your behalf can ask the Guardianship Tribunal to review the enduring guardianship appointment.

### **WHEN DOES AN ENDURING GUARDIANSHIP START?**

The appointment of your Enduring Guardian takes effect only if you become unable to make your own personal or lifestyle decisions. Your Enduring Guardian may wish to seek the opinion of a medical practitioner about your capacity to make decisions before acting on your behalf.

### **WHEN DOES AN ENDURING GUARDIANSHIP END?**

An enduring guardianship appointment ends:

- when you die,
- if you revoke the appointment,
- if you marry after appointing an enduring guardian,
- if one of the guardians dies, resigns or becomes incapacitated and they were appointed jointly (unless you provide otherwise in the form), or
- if the Guardianship Tribunal revokes the appointment of enduring guardian.

### **HOW DO I REVOKE MY ENDURING GUARDIANSHIP APPOINTMENT?**

While you are capable of making your own decisions you can:

- revoke the appointment of an Enduring Guardian by way of a written revocation;
- appoint a new person as your Enduring Guardian;
- change the Functions or directions given to your Enduring Guardian.

Only the Guardianship Tribunal can make changes to the appointment if you have lost the capacity to do this for yourself.

### **CAN AN INTERSTATE ENDURING GUARDIANSHIP APPOINTMENT BE USED IN NSW?**

Yes. If an enduring guardianship appointment was made in another Australian state or territory then it is automatically recognised in NSW.

Please note that this does not apply to Enduring Guardian appointments which are made overseas.



## **CAN A NSW ENDURING GUARDIANSHIP APPOINTMENT BE USED INTERSTATE OR OVERSEAS?**

If you want your enduring guardianship appointment to be used in another state or overseas, you should make enquiries in that state or country.

Every state and country has different laws about enduring guardianship.

## **WHAT IF SOMEONE IS WORRIED ABOUT WHAT MY ENDURING GUARDIAN IS DOING?**

Anyone with a genuine concern for your welfare can apply to the Guardianship Tribunal for a review of the appointment if they feel that your Enduring Guardian is not making appropriate decisions on your behalf.

The Tribunal can revoke the appointment, confirm it, change the Functions in the appointment or make a guardianship order.

The Tribunal does not supervise Enduring Guardians. It will act only if it receives an application from a concerned person and receives information which leads it to review the Enduring Guardian appointment.

## **HOW CAN TEECE HODGSON & WARD ASSIST?**

If you require further information or advice concerning the above please contact Richard Neal, Deborah Linwood or John Maitland using the following contact details.

✉ [mail@teece.com.au](mailto:mail@teece.com.au)

☎ 02 9232 3733

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This Information sheet is intended to provide general information about current law relating to Enduring Guardianships. It is not intended to be comprehensive or to provide any specific legal and / or tax advice and should not be acted or relied upon as doing so.

Professional advice appropriate to a specific situation should always be obtained.

DATED 1 March 2009

