



# WILLPOWER PLUS

## Enduring Guardian Appointments



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## Enduring Guardian Appointments



### 1. *What is an enduring guardian?*

An enduring guardian is someone appointed to make decisions about the health, care and welfare of another person – usually a close friend or relative – if the other person is incapable of looking after him or her self.

### 2. *Who can be appointed as an enduring guardian?*

Any one who is over the age of 18 years, who has mental capacity, and is willing to act, can be an enduring guardian.

### 3. *When can the enduring guardian act?*

The enduring guardian can make decisions about the appointor's care, health and welfare if 2 requirements are met:

- 3.1 the appointor must be totally or partially incapable of managing his or her person because of a disability, and
- 3.2 the enduring guardian's appointment must not have been revoked or suspended (as to which see 10 and 11 below).

### 4. *When is an appointor incapable of managing his or her person because of a disability?*

This will be the position if the appointor is:

- 4.1 mentally ill (as defined in the *Mental Health Act*)
- 4.2 disabled and restricted in one or more major life activity to such an extent that he or she requires supervision (or similar)
- 4.3 of advanced age, or
- 4.4 intellectually, sensorily, physically or psychologically disabled.

### 5. *Who is ineligible to be an enduring guardian?*

The following are ineligible to be appointed as an enduring guardian:

5.1 A person who, in a professional or administrative capacity, is directly or indirectly responsible for or involved in the provision of any of the following services to the appointor for a fee or reward:

- 5.1.1 medical services
- 5.1.2 accommodation, or
- 5.1.3 services supporting the appointor's daily activities.

5.2 A person who is the spouse, parent, child, brother or sister of the person described at 5.1 above.



### 6. *How is an enduring guardian appointed?*

There are a number of requirements which must be strictly followed. Firstly, *the appointor* must:

- 6.1. use the prescribed form (or similar)
- 6.2. sign the form, and
- 6.3. do so before a prescribed witness (who is usually a legal practitioner).

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Next, *the prescribed witness* must certify that the appointor signed voluntarily in the legal practitioner's presence and that the appointor appeared to understand the effect of the document.

Thirdly, *the enduring guardian* must:

- 6.4. sign accepting the appointment, and
- 6.5. do so before a prescribed witness.

Lastly, *the prescribed witness* who witnesses the enduring guardian's acceptance must certify that the enduring guardian signed voluntarily in the legal practitioner's presence and appeared to understand the effect of the document.

## 7. *Who should be appointed as the enduring guardian?*

The appointor should appoint the person who is most suitable to make the decisions that the enduring guardian can make. Factors such as the age, health, relationship, place of residence, life experience, availability and compatibility with the appointor (and possibly the attorney) are often considered in deciding the most suitable person to be the enduring guardian.

## 8. *What decisions can the enduring guardian make?*

This depends on the functions that the appointor gives to the enduring guardian. Commonly, an enduring guardian is given functions to:

- 8.1. decide where the appointor may live;
- 8.2. decide the health care that the appointor receives;
- 8.3. decide the personal services that the appointor receives; and
- 8.4. consent to medical or dental treatment for the appointor (with certain limitations).

Other functions which may be given to the enduring guardian include the ability:

- 8.5. to decide with whom the appointor has contact;
- 8.6. to order the ending of treatment;
- 8.7. to facilitate organ and/or tissue donation;

- 8.8. to ensure that steps are taken to preserve the appointor's dignity;
- 8.9. to obtain information about the appointor's treatment and care; and
- 8.10. to act in accordance with an Advance Care Directive.
- 8.11. (with a youngish person) to make decisions about employment.

## 9. *What decisions can't the enduring guardian make?*

There are some functions that the enduring guardian can't make. For instance:

- \* special medical treatments (such as sterilisation);
- \* treatment that is contrary to the appointor's specific directions (such as contained in an Advance Care Directive); and
- \* authorising police or ambulance personnel to take and retain the appointor at a specific designation.

Only the Guardianship Division of NCAT or Supreme Court can approve the first treatment or make the third authorisation mentioned above.

## 10. *How does the enduring guardian's appointment end?*

There are a number of ways for the appointment to end:

- 10.1. the appointor can revoke the appointment whilst he or she has mental capacity by completing a document revoking the appointment.
- 10.2. the appointor may die.
- 10.3. the appointor may marry someone other than the enduring guardian.
- 10.4. the enduring guardian may die or become incapacitated.
- 10.5. the enduring guardian may resign. (If the appointor has lost the mental capacity to appoint another enduring guardian, the Guardianship Division of NCAT must approve an enduring guardian's resignation.)

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## 11. *When may the enduring guardianship be suspended?*

- ❖ If a guardianship order is made by the Guardianship Division of NCAT or Supreme Court; or
- ❖ If the Guardianship Division of NCAT (or Supreme Court) when reviewing the guardian's appointment orders the suspension of the appointment.



## 12. *What principles govern the enduring guardian's decisions?*

The enduring guardian must act with the following ideals and concepts in mind:

- ❖ the welfare and interests of the appointor
- ❖ freedom of decision and action by the appointor
- ❖ maintenance of a normal community life
- ❖ the appointor's views
- ❖ family, cultural and linguistic relationships and environments
- ❖ self reliance in personal, domestic and financial affairs
- ❖ protection from neglect, abuse and exploitation.

## 13. *What happens if no-one is appointed as an enduring guardian?*

There are two possibilities:

13.1 Someone who comes within the statutory definition of "person responsible" can make decisions about *medical treatment* for the person in need, or

13.2 If no one comes within the definition, there is more than one eligible person and they disagree, or a decision needs to be made on an issue other than medical treatment, an application may be made to the Guardianship Division of NCAT for the appointment of a guardian.

## 14. *Why not simply leave it to the 'person responsible'?*

There are at least three reasons:

14.1 The 'person responsible' has limited authority – he or she is restricted to decisions about medical treatment.

14.2 There may be many people who fit the description of 'person responsible', and all of them have the same authority to make decisions about medical treatment. Not all of them may be suitable. And having more than one person having concurrent authority can lead to inconsistent or conflicting decisions.

14.3 There may be no one who fits the description, or no one with capacity, or no-one willing to act at the time the decision on medical treatment is required.

## 15. *Why not simply leave it to the Guardianship Division of NCAT?*

Again, there are at least three reasons:

15.1 The Guardianship Division considers it is better for the appointor to make their own decision about their guardian than for the NCAT Division to do so. Generally, the appointor is better able to assess the merits of a person who may be able to fulfil this important role.

15.2 The appointment of an enduring guardian means the person appointed can act more quickly once the need arises. It is usually less stressful for the family to have someone able to act immediately, than to have to make an application to the Guardianship Division.

15.3 An appointment will normally avoid the disputes that can occur before the Guardianship Division.



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