



Villamanta Disability
Rights Legal Service Inc.

Villamanta Disability Rights Legal Service Inc.

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Guardianship

The law assumes that all people are competent to make decisions about their lifestyle when they turn eighteen years old. If you are not competent to make your own decisions, orders of administration and guardianship are legal and formal ways by which another person can make decisions for you. Under a guardianship order, a guardian is appointed to make decisions in relation to your day to day life. Under an administration order, an administrator is appointed to make decisions in relation to the management of your finances and other legal matters. This Information sheet is mainly concerned with guardianship orders.

What is a guardianship order?

If you are a person:

- Over the age of 18 years;
- Who has a disability (including an intellectual impairment, brain injury, mental disorder, physical disability or dementia); and
- That disability prevents you from making reasonable judgments about matters relating to your circumstances and day to day living (such as those relating to health, accommodation or access to services);

the Guardianship List of the Victorian Civil and Administrative Tribunal (the **Tribunal**) can make a **guardianship order** appointing a **guardian** to make those decisions for you. A guardianship order is a legal document. A guardian can be appointed to make all decisions (a **plenary guardian**) or only decisions about a limited range of things (**limited guardian**). If a limited guardian is appointed, the guardianship order will set out the sorts of decisions that the guardian is allowed to make. A guardian may also be appointed temporarily.

Who can be a guardian?

Any person over the age of 18 years can be appointed as a guardian, if the Tribunal is satisfied that:

- They will act in your best interests;
- They have no conflict of interest with you; and
- They are a suitable person to act as your guardian (including whether they are compatible, easily available and likely to match with your wishes).

In many cases a family member will be appointed as a guardian, as the Tribunal prefers to appoint a guardian who is familiar with your beliefs and values, likes and dislikes. However, the Office of the Public Advocate (**OPA**) can also be appointed if there is no suitable relative or friend available or if there is a disagreement about what is best for you. The Tribunal can appoint a single guardian or joint guardians. If joint guardians are appointed, both must agree for a decision to be valid.

IMPORTANT NOTE!

Remember - this Information Sheet has been produced only for use in **Victoria, Australia.**

Some of the laws mentioned in this Information Sheet will be different in other places.

How is a guardian appointed?

Any person can apply to the Tribunal for a guardianship order for a person with a disability. An application is made by completing the relevant form, (available on the websites of the Tribunal, OPA and Villamanta) and lodging it at the Tribunal. We suggest that before filling in the form, you should contact the OPA to discuss whether guardianship is necessary and to get advice about extra written material that may be needed for the application. A hearing date will be set after the form is lodged with the Tribunal. Urgent applications will be heard by the Tribunal as soon as possible, and other applications will generally be heard within 30 days of receiving the application.

What factors does the Tribunal consider?

In deciding whether or not to make a guardianship order and the type of order to make, the Tribunal must consider:

- Your wishes;
- Whether a guardianship is the least restrictive way of meeting your needs;
- The wishes of any nearest relatives or other family members; and
- The importance of preserving family relationships.

The Tribunal must ultimately decide what is in your best interests.

When can a guardian be appointed?

Guardians are not appointed for people who do not have disabilities. If you are competent, you may appoint an enduring guardian (see the Information Sheet - Enduring Guardianship).

A guardian will be appointed only where there is no other less restrictive means of achieving a result which is in your best interests.

Powers of a guardian

The powers given to a guardian will depend on the order made by the Tribunal.

In a **limited guardianship order**, the Tribunal will set out the types of decisions that your guardian can make for you, such as decisions about where you will live and who you will live with. A **plenary guardianship order** gives your guardian the power to make all lifestyle decisions for you, except in the area of health care where there is an existing medical enduring power of attorney or an appropriate 'person responsible'. All guardians are accountable to the Tribunal for the decisions that they make.

Duties of a guardian

If a guardian is appointed for you, that guardian will have a duty to act in your best interests.

This means that a guardian must, as much as possible:

- Act as an advocate for you;
- Encourage you to participate in community life;
- Assist you to become capable of caring for yourself and making reasonable judgements;
- Protect you from neglect, abuse or exploitation; and
- Take your wishes into account as far as possible.

Guardianship and health care

If you do not have the capacity to consent to your own health care or medical treatment, the medical practitioner can obtain consent from the **person responsible**. However, any decisions made must be in your best interests and the least restrictive option in the circumstances. If a guardianship order does not specify that your guardian has the power to make health care decisions for you, your guardian may be able to consent to medical or dental treatment on your behalf as the 'person responsible'. The 'person responsible' may, in order of priority but depending on the circumstances, include a person appointed under an enduring power of attorney (medical treatment), a person appointed by the Tribunal to make decisions about the proposed medical treatment, a guardian with health care powers or may, depending on the circumstances, or your spouse, domestic partner, primary carer or nearest relative. There are certain medical decisions that a person responsible or guardian does not have authority to consent to, including procedures to render a person permanently infertile, terminate pregnancy, or remove tissue for transplant. See the Medical Treatment Fact Sheet for further information.

Can a guardian seek advice?

A guardian can seek advice from the Tribunal about the scope of the guardianship order or about exercising any power that they have under the guardianship order.

Duration of a guardianship order

A guardianship order will generally remain in place for a maximum of three years, and it can be renewed indefinitely. The Tribunal must conduct a reassessment of a guardianship order within 12 months of making the order and at least once every three years after making the order.

Temporary orders

The OPA has a 24-hour emergency service. If the Tribunal considers that a matter is urgent, it may make a temporary guardianship order that remains in place for 21 days. If necessary, the Tribunal may extend the order for a further 21 days. Before the end of the temporary order, the Tribunal must hold a hearing to determine whether a permanent guardianship order is required.

How can I change or revoke an existing guardianship order?

You can apply to the Tribunal have your guardianship order revoked. To do this, you will need to show either that you no longer have a disability, or that your disability no longer prevents you from making informed or reasonable decisions about your day to day living and care. Medical reports from your treating doctor or an independent assessment by a doctor that demonstrate that your disability no longer prevents you from making decisions about your own affairs will assist your application. If you still require a guardian, but you think your current guardian is not acting in your best interests, you can apply to the Tribunal to have the order changed to appoint a different guardian. Your guardianship order can also be reassessed to consider, for example, whether a limited guardian should be appointed instead of a plenary guardian. You or any other person can apply for a reassessment of your guardianship order, but the Tribunal has discretion as to whether or not to conduct an early hearing. The Tribunal also has the power to conduct a reassessment on its own initiative. The Tribunal may decide to schedule an early reassessment if, for instance, there has been some material change in your circumstances. The Tribunal has the power to correct, change, continue, replace or revoke a guardianship order following a reassessment.

Interstate orders

It is possible to register Victorian guardianship orders in other states and to register interstate orders in Victoria. Contact the Office of the Public Advocate for further information.

Things you should know about guardianship

A guardian should:

- Respect your wishes, while acting in your best interests;
- Respect your family relationships, cultural background and confidentiality;
- Consult with anyone who has a real interest in your well-being; and
- Be available to fulfil the responsibilities of the role of guardianship properly.

A guardian will not:

- Be a case worker or social worker;
- Make decisions about your finances; or
- Take over the role of your relatives or next-of-kin.

Who can I ask for assistance?

If you have any questions about guardianship or guardianship orders, the following organisations may be able to assist:

- Villamanta Disability Rights Legal Service on 1800 014 111
- Office of the Public Advocate on 1300 309 337
- Mental Health Legal Centre on 9629 4422
- Victoria Legal Aid on 9269 0120
- Public Interest Law Clearing House (PILCH) on 1800 606 313