



Villamanta Disability  
Rights Legal Service Inc.

# Villamanta Disability Rights Legal Service Inc.

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## Appointing an Enduring Guardian

### What is an enduring power of 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. An **enduring power of guardianship** is a way of giving somebody the power in advance to make lifestyle decisions for you when you are not able to do so yourself. Similar arrangements include an **enduring power of attorney (financial)** and an **enduring power of attorney (medical treatment)**. This information sheet is mainly about *your* choice to appoint someone to act for you when you cannot make decisions for yourself. For information generally about guardianship or administration see the Information Sheets - *Guardianship* and *Administration*.

### Why should I appoint an enduring guardian?

We recommend that everyone should have an enduring power of guardianship as it is the only way you can control who will make lifestyle decisions on your behalf if you are ever unable to do so by reason of a disability.

### How old do I have to be to appoint an enduring guardian?

You must be eighteen years of age or over.

### Must I have a disability before I can choose an enduring power of guardianship?

No. There may come a time for all of us when we cannot make decisions about our daily lives because of temporary or permanent illness, accident, injury or old age. An enduring power of guardianship means that you can choose now the person who will make these important decisions for you when you can no longer do so for yourself.

### When should I make an enduring power of guardianship?

All adults should consider appointing an enduring guardian, as accident or illness can strike any of us at any time without warning. However, it may be more important for someone who is ill or is about to have a serious operation to think about the need to make arrangements to make sure the right decisions are made about their well being, should they no longer be able to do so.

### What powers can I give my enduring guardian?

In the document appointing the enduring guardian, you may set out exactly the type of lifestyle decisions your guardian can make for you. For example, where you will live, how your health care will be maintained and who can visit you. You may also say what type of decisions the guardian cannot make. You can also list any things that you want the guardian to take into account when making a decision on your behalf. You should discuss your wishes with your enduring guardian before making the appointment. An enduring power of guardianship cannot be used to make financial or legal decisions. The appropriate instrument to appoint someone to make future financial or legal decisions is an enduring power of attorney (financial).

#### 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.

### **What if I do not specify any powers that my enduring guardian is to have?**

If you do not state clearly the powers your enduring guardian is to have, then your enduring guardian will be deemed to have all the powers of a plenary guardian. These amount to the same powers as if she or he were your parent and you were their child. These powers include the power to make decisions about your accommodation, medical treatment, employment and general lifestyle, including who you may visit or be with. For more information about the powers of plenary guardians see the Information Sheet – Guardianship. To ensure that your wishes are met, you should be specific when setting out the powers that you wish your enduring guardian to have and how you wish them to be exercised.

### **Are there any powers that my enduring guardian may not exercise?**

If you give your enduring guardian the power to make healthcare decisions for you, they can agree to medical treatment but cannot refuse medical treatment. Your enduring guardian also cannot agree to the following special medical procedures being conducted on you:

- those likely to lead to infertility;
- any involvement in medical research;
- termination of a pregnancy; or
- removal of tissue for transplant.

These special medical procedures can only be authorised by the Guardianship List of the Victorian Civil and Administrative Tribunal (**Tribunal**).

### **Who can I appoint as my enduring guardian?**

You may appoint anyone who is eighteen years of age or over and who is competent (has capacity) (see the Information Sheet - *Capacity and Consent*). You can appoint any person that you choose, as long as they agree to take on the role. The person that you appoint should be someone that you can trust to respect your wishes. The person that you appoint as an enduring guardian must not, at the time that you appoint them, provide you with professional care, treatment or accommodation. This does not include a family member caring for you at home (unless they are charging you to do so) but it would include a manager of a nursing home.

### **How do I appoint an enduring guardian?**

You must complete, sign and have witnessed an enduring power of guardianship form, which is available from the Office of the Public Advocate (**OPA**) and Victorian Legal Aid. On the form you can set out the powers that you are giving to your enduring guardian and how you wish them to make decisions. Your enduring guardian agrees to the appointment by signing the acceptance section of the form. You must then get the form witnessed by two other people. One of these people must have authority to witness statutory declarations (for example a solicitor, justice of the peace, doctor or member of the police force). You may not use any of your relatives, or any of the proposed guardian's relatives, as a witness. You do not have to register or send the form anywhere once it is completed for it to take effect. You should keep the original form in a safe place and keep a certified copy for everyday use. The power of an enduring guardian will begin when you are unable to make decisions for yourself.

### **What can I expect of my enduring guardian?**

Being an enduring guardian is a serious responsibility and sometimes may be a difficult task. Whoever your guardian is, you are entitled, by law, to expect that your enduring guardian will take notice of what you want and will act in your best interests. This means that it is important to choose a guardian you trust. Your proposed guardian should be someone who knows you well, or someone who is prepared to spend enough time getting to know what is important to you. The enduring guardian's job is to make the decisions that you would make yourself if you could. That might mean very different decisions for two different people in the same circumstances. The guardian should always know enough about you to be able to decide the things that are right for *you*. An enduring guardian has the right to apply to the Tribunal for advice or directions on any matter about his or her appointment as enduring guardian.

In response the Tribunal may give any advice, opinion, directions or orders that it considers are necessary. The Tribunal may also make changes to the document appointing the enduring guardian, including changing the enduring guardian's powers.

### **How does an enduring power of guardianship relate to other types of powers of attorney?**

If you have also appointed someone with an enduring power of attorney (medical treatment) they will take precedence over your enduring guardian for all medical treatment decisions.

### **Can I cancel my enduring power of guardianship?**

Yes. You may cancel your enduring power of guardianship at any time as long as you have the mental competence (capacity) to do so (See the Information Sheet - Capacity and Consent.) To cancel it, you must complete a *Revocation of appointment of enduring guardian* form, which is available from the OPA and Victorian Legal Aid. The form needs to be signed by you and two witnesses, one of whom is authorised to witness statutory declarations (see above). The enduring guardian that you are trying to cancel cannot be a witness to this document. When you appoint a new enduring power of guardianship, any earlier powers of guardianship that you have made will be automatically cancelled.

In other words, the most recently made power of guardianship is the one that will be accepted. If you do cancel or change an enduring guardian, you should make sure that you tell everyone who needs to know this, for example, your solicitor, bank manager, doctor, dentist, family members and advocate, if you have one.

### **Can anyone else cancel my enduring power of guardianship?**

An application to the Tribunal to remove an enduring power of guardianship can be made by:

- the Public Advocate;
- the enduring guardian;
- the administrator of your estate (see the Information Sheet - Administration); or
- any person who the Tribunal is satisfied has a genuine interest in you or your estate.

The Tribunal may cancel your appointment at any time after you lose mental capacity if:

- your enduring guardian indicates she or he no longer wants to act for you; or
- the Tribunal believes that your enduring guardian has acted incompetently or negligently, or in a manner that is not in your best interests.

If the Tribunal does decide to cancel the appointment and remove your enduring guardian, it may appoint another enduring guardian in her or his place.

### **What if my enduring guardian is away for an extended period?**

You can appoint an alternative enduring guardian. An alternative enduring guardian takes the place of, and has the same powers as, the original enduring guardian if that person is incapable of acting as the enduring guardian or is absent for a period.

### **Who can I ask for assistance?**

If you have any questions about enduring guardianship, 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
- Victoria Legal Aid on 9269 0120
- Public Interest Law Clearing House (PILCH) on 1800 606 313