

Enduring Guardianship *infosheet*



What is an enduring guardian?

An enduring guardian is a person you appoint who would make decisions about your personal circumstances if you lost the capacity to make decisions due to the onset of a disability.

If you register an enduring guardianship with the Guardianship and Administration Board, that document will give you certainty about who will make personal decisions for you if you should lose decision-making capacity.

If you lose capacity but have not appointed an enduring guardian, decisions about medical treatment may be made on your behalf by a 'person responsible' who your doctor believes has a sufficient personal connection with you to consent or refuse treatment on your behalf. Additionally, the Guardianship and Administration Board may appoint a guardian for you to make decisions such as where you live, what health care you have and who visits you. Generally a guardian is only appointed by the Guardianship and Administration Board in circumstances of conflict or where some legal authority is required to promote your best interests.

An enduring guardian is not empowered to make decisions about your finances or your estate. Under Tasmanian law, that role is created by registering an enduring power of attorney. You should seek advice from a legal practitioner or a Trustee company about the appointment of an enduring power of attorney.

What decisions would my enduring guardian make?

If you lose capacity, an enduring guardian can make decisions about your health care and accommodation. A guardian can also make decisions about who visits you or what support services you should receive (e.g. meals on wheels, physiotherapy).

Your enduring guardian is responsible for:

- Acting in accordance with any conditions or wishes expressed by you in the instrument of appointment
- Acting in your best interests and promoting your dignity
- Ensuring that you retain as much freedom of action and decision as is possible
- Considering your wishes before imposing any decisions upon you

How do I express any conditions?

The instrument of appointment can include particular directions or conditions with which the guardian must comply when making decisions on your behalf. You can appoint an enduring guardian with as many conditions as you wish, or you might not include any conditions at all. If you do not include any conditions, your guardian will have full power as set out in section 25 of the *Guardianship and Administration Act 1995*.

Please ensure that your conditions are as clear as possible, so that your guardian can be sure that he or she is following your wishes. You may wish to seek legal or medical advice about the way that you express the conditions.

Here are some examples of conditions:

- I direct my guardian to consult my friend [name] on any important decisions about my health and welfare.
- If I require long-term care in a facility outside my home, I would prefer to live close to my brother, [name].
- When my guardian assumes his or her role, I direct my guardian to notify my relative [name, address] of any serious medical issues that may arise.
- Because of my religious beliefs I do not wish to receive a blood transfusion or blood products under any circumstances.
- I would like life-prolonging treatments to be commenced and continued, including Cardio Pulmonary Resuscitation, while they are medically appropriate and remain in my best interests.
- If I am acutely ill and unable to communicate responsively with my family and friends and it is reasonably certain that I will not recover, I want to be allowed to die naturally and to be cared for with respect for my dignity. I do not want to be kept alive by extraordinary or overly burdensome treatments that might be used to prolong my life. If any of these treatments have been started, I request that they be discontinued. However, I do want palliative care that includes medications, and other treatments to alleviate suffering and keep me comfortable, and to be offered something to eat or drink.
- I direct my guardian to arrange for a priest of [my religion] to attend to me on a regular basis.
- When my guardian assumes his or her role, I direct my guardian to advise my attorney [name] of my condition so that they may arrange for my Enduring Power of Attorney to take effect.

Who can I appoint as my enduring guardian?

Your guardian must be over 18 years of age.

You cannot appoint a person who is directly or indirectly involved in an administrative or professional capacity in your medical care or treatment (e.g. your GP or your physiotherapist or their receptionists).

You can appoint single or joint guardians.

You can appoint an alternative guardian to make decisions on your behalf in circumstances where the original guardian is absent or incapacitated.

You cannot appoint the Public Guardian as your enduring guardian.

Can I change my mind?

You can revoke an enduring guardianship. You can amend your enduring guardianship conditions. You can appoint a new enduring guardian. However if you lack capacity to make decisions at the time of making changes to an enduring guardianship, those changes may be found to be invalid. Any changes you make to an enduring guardianship must be registered and a new fee paid for registration.

If you have an existing enduring guardianship, your new appointment should clearly state that the new appointment revokes the existing appointment. (The Standard Form includes a paragraph that meets this requirement.)

What factors should I consider?

You need to appoint **a person who you trust**. Your guardian should be a person who knows your wishes and preferences. Your guardian must be a person who is **decisive** and is able to **advocate** clearly on your behalf to medical staff, care providers and to other members of your family.

If you are considering appointing more than one person as your guardian, ensure that they will be **able to cooperate** in making decisions on your behalf.

Remember that enduring guardians are rarely called on to make decisions but, when they are, it is often in **circumstances of conflict**, including conflict with you. (For example, guardians commonly have to decide that the appointor needs residential aged care to stay safe, but the appointor wishes to remain in their own home.) Ensure that your guardian is a person who can make rational decisions in circumstances of conflict.

Ensure that you have discussed the reasons for your appointment with your guardian. Appointing an enduring guardian is a good opportunity to discuss your end-of-life preferences with your friends and family and to explain your values and concerns.

Consider seeking legal advice about appointing an enduring guardian.

Can my enduring guardian make decisions for me if I am out of Tasmania?

Most Australian States and Territories recognise a Tasmanian enduring guardianship. South Australia and the Northern Territory do not recognise these enduring guardianships.

Who supervises my guardian if I lose capacity?

Your enduring guardian does not need to report to any person or seek approval for his or her decisions, unless you have made that a condition of your appointment. However, if a person has a concern that your guardian is not acting in your best interests, an application can be made to the Guardianship and Administration Board to review the appointment. A review may result in the revocation of the enduring guardianship or an amendment (e.g. appointing a new guardian).

What is the difference between an enduring guardianship and an advance directive?

An enduring guardianship is an appointment recognised under Tasmanian law. Your guardian will be able to make legally binding personal decisions on your behalf. An enduring guardianship can cover issues such as medical treatment, accommodation, access to visitors and any personal (non-financial) matters. It will apply after you have lost capacity to make personal decisions.

Because advance directives have not been legislated for under Tasmanian law, there is no certainty that an advance directive will be legally binding after you have lost capacity to make and enforce your own decisions.

The Board strongly recommends that if you want to plan for future medical and personal decisions in case you may lose decision-making capacity, that you appoint an enduring guardian instead of completing an advance directive. If the validity of an enduring guardianship is challenged, the Guardianship and Administration Board will hear and determine that challenge without cost and without the need for legal representation. If the validity of an advance directive is challenge, such a challenge would be heard and determined by the Supreme Court and there could be significant legal costs associated with that challenge.

How do I register this document?

Please note that there are strict requirements for the witnessing of an enduring guardianship. The witnesses must be over 18 years of age and must not be related to you or to your guardians. Instruments of appointment that are not appropriately witnessed may be rejected for registration or invalidated after a review by the Board.

Your guardian must have signed the instrument to indicate that he or she accepts appointment as your guardian.

Your enduring guardianship document must be registered to have legal effect (i.e. to be valid). To register this document, please present it to a Service Tasmania outlet and pay the required fee. If you cannot afford to pay the fee you can present your enduring guardianship to Service Tasmania and ask that they submit a request for a waiver of the fees on your behalf. You should provide to Service Tasmania a written statement setting out the reasons for your financial hardship and why you cannot afford to pay the fee. Please refer to the Board's website regarding the fee rate.

Upon registration the Board will return copies of the Instrument to you. You should provide a copy to your guardian(s), your care providers and to your medical practitioner.

Want more information?

The Instrument Appointing Enduring Guardians and this *Infosheet* can be downloaded from: <http://www.guardianship.tas.gov.au/forms2>

You can download a *Handbook for Enduring Guardians* at: https://www.guardianship.tas.gov.au/__data/assets/pdf_file/0009/129438/Handbook-for-Enduring-Guardians.pdf

The Office of Public Guardian can disseminate information concerning enduring guardianship and give advice on the powers of an enduring guardian - Monday to Friday between 9am and 5pm. **Phone: (03) 6165 3444**

The Legal Aid Commission has a Telephone Advice Service available Monday to Friday between 9am and 5pm. **Phone: 1300 366 611**