



Private Guardian's Handbook

*Information for Guardians Appointed by the
Guardianship and Administration Board of Tasmania*

May 2017

Copyright notice

This publication, *Information for Private Guardians* (this booklet), has been prepared for use by guardians appointed by the Guardianship and Administration Board of Tasmania. Copyright in the manual vests in the Crown in right of the State of Tasmania.

Unless permission is obtained from the President of the Board, no part of this manual is to be reproduced in any forms or by any means.

Disclaimer

This booklet has been prepared for use by guardians appointed by the Board and members and staff of the Guardianship and Administration Board only.

Although all due care has been taken in the preparation of this booklet, it is only to be used as a guide and to provide general instructions and information for appointed guardians, Board members and staff.

The Crown in right of the State of Tasmania, its officers, employees and agents do not accept liability however arising, including liability for negligence, for any loss resulting from the use of or reliance upon any representation, statement, opinion or advice contained within this manual.

Acknowledgements

I would like to acknowledge that development of this booklet has been significantly assisted by the co-operation of members of the Australian Guardianship and Administration Council. In particular, I would like to acknowledge the work of John Harley, former Public Advocate of South Australia who developed "*Now You Are a Guardian, A Manual for Private Guardians in South Australia*," Colleen Pearce, Public Advocate in Victoria who developed "*Good Guardianship, A Guide for Guardians Appointed Under the Guardianship and Administration Act*," the Adult Guardianship Executive Office of the Northern Territory who developed "*Directions and Information for Adult Guardians and Estate Managers*" the Public Advocate of the Australian Capital Territory who developed "*Guardianship Standards June 2007*" and the Queensland Guardianship and Administration Tribunal for the development of guardianship reporting documents.

Rowena Holder
President
Guardianship and Administration Board, Tasmania

Contents

Copyright notice.....	2
Disclaimer.....	2
Acknowledgements.....	2
Foreword.....	5
1. Understanding Guardianship for Adults with Disabilities.....	6
2. Guardianship Orders.....	10
Appointments by the Guardianship and Administration Board:	10
The role and responsibility of guardians appointed by the Board	12
3. Principles of Guardianship Decision Making.....	13
4. Roles and Duties of a Guardian.....	16
Making Decisions under Accommodation Powers	17
Making Decisions under Employment Powers	19
Making Decisions under Access Powers	20
Consent to Medical Treatment and Other Health Care.....	21
Other Guardianship Powers.....	26
Ensuring privacy and confidentiality.....	28
6. What can't a Guardian Decide?	29
7. Working with others – Relationships and Networks	30
8. Accountability, Reporting and Review of Guardians	32
Reporting by Guardians	32
Review of Guardians	32
9. Useful Contacts	34
Appendix A – Report forms for Guardians.....	35

Foreword

Being a guardian for a person with a disability is a very special kind of responsibility. Guardianship of adults with disabilities arises in two ways in Tasmania. Firstly under an appointment by the Guardianship and Administration Board and, secondly, by appointment under an Instrument Appointing an Enduring Guardian. Regardless of how you have been appointed, you have accepted a responsibility to act in the best interests of an adult with a disability. It is important that you respect that person's rights as an adult, but at the same time ensure their wellbeing, safety and comfort in the decisions that you make.

The Board or the person appointed you because they were satisfied that you have the necessary qualifications and relationship with that person to carry out that important task.

This Booklet has been written to assist you in understanding the duties that are involved in being a guardian and to know where and when to seek assistance. Because your appointment carries a heavy responsibility it is important that you obtain as much information as possible and take advantage of the resources available including the advice offered by staff members of the Board and the Office of the Public Guardian.

Rowena Holder
President
22 May 2017

1. Understanding Guardianship for Adults with Disabilities

Making Decisions and Substitute Decision Making

Making a decision is an important part of being an adult. As a person progresses from childhood to adulthood an important part of maturing is taking responsibility for our own decisions and, at times, accepting the consequences of those decisions. Our laws determine that certain important decisions are denied to young people until they reach a specified age (e.g. a decision to enter into contracts, smoke cigarettes, drink alcohol, marry, have sexual intercourse and vote in an election). Once a person reaches adulthood, however, it is assumed that they are capable of making and responsible for all of the decisions that they make. Making decisions about important issues in your own life is a fundamental expression of your human rights.

Adults with disabilities can make decisions and those decisions are binding in law, the same as adults without disabilities. However, some disabilities may impair a person's ability to make reasonable decisions in such a manner as their health, wellbeing and safety is jeopardised by the risk of neglect, abuse or exploitation. Therefore a range of legislative measures exist to ensure that people whose disabilities impair their ability to make reasonable decisions are protected by the appointment of a substitute decision maker. A guardian is one of a range of substitute decision makers available under legislation. Other examples include: enduring powers of attorney, administrators, Centrelink nominees, medical practitioners acting under mental health orders and 'persons responsible' making health care decisions.

A guardian is a person who has legal authority to make decisions on behalf of another person who is unable to make reasonable decisions because he or she has a disability that affects his or her ability to make reasonable decisions.

A person may be appointed as a guardian in Tasmania in two ways. The Guardianship and Administration Board may appoint a guardian after hearing an application for guardianship, or an adult with capacity to do so may appoint a guardian under an enduring guardianship to act as a guardian on his or her behalf if at some later point in time he or she loses capacity to make reasonable decisions.

A guardian has no authority to make financial decisions on behalf of a person under guardianship. This is the role of an attorney acting under an enduring power of attorney or of an administrator appointed by the Guardianship and Administration Board.

When is a guardian needed?

All people have a right to make decisions about how they live their own lives. Most people with cognitive or psychiatric disabilities are able to, and regularly do, make personal and lifestyle decisions. If not, they may be supported by family and friends to do this without the need for a guardian to be appointed. These are called *informal support arrangements*. If informal support arrangements are working well, they should not be disturbed.

Sometimes, however, a person is unable to make important life decisions due to a cognitive or psychiatric disability or an incapacity arising from another type of disability. Informal support arrangements may be ineffective, the person may not have anyone to assist with decision making, or family and friends may disagree about what decisions should be made. When there is a need for a decision to be made, the Guardianship and Administration Board may consider it necessary to appoint a guardian as a substitute decision maker for the person with the disability. Alternatively, if the person with the disability had already appointed an enduring guardian, that person will become involved in making the decision on the person's behalf.

What is the Guardianship and Administration Board?

The Guardianship and Administration Board is an independent statutory Board with the authority to appoint guardians or administrators to make important decisions affecting the lives and property of people with decision-making disabilities. The main role of the Guardianship and Administration Board (the Board) is to determine whether an adult with a disability needs a guardian or an administrator and if necessary to appoint someone to make the relevant decisions for that person.

Applications are commonly made to the Board where a person has dementia, an intellectual disability, an acquired brain injury, a psychiatric disability or a combination of these. Before the Board has power to make a decision about a person with a disability, it must ascertain that such a disability has the effect of making the person incapable of making reasonable decisions or from communicating such decisions. To determine this, the Board relies on medical evidence from the person's doctor, psychiatrist or psychologist and the views of the person's family and friends.

The Board will also take into account the wishes of the person with a disability. For that reason, the participation of the person with a disability is important in the investigation and the hearing processes of the Board.

Hearings before the Board are much less formal than a traditional court. The Board will ask the applicant and other people attending the hearing questions about the application. People attending the hearing may also ask questions. The Board will listen to all parties involved and consider all the written information that people have provided. The Board will announce its decision whether or not to make an order at the end of the hearing.

The Board consists of the President, who is a lawyer and a number of members from legal, medical, accounting and community backgrounds who are rostered to sit when it conducts its hearings. Members of the Board are appointed for their knowledge and experience in relevant areas. A single member or a panel of three members of the Board, depending on the type of application, will hear an application.

Who is the Public Guardian?¹

The Public Guardian is a public official who can be appointed to be the guardian of an adult with a disability. The Office of the Public Guardian promotes, speaks for, and protects the rights and interests of people with disabilities and acts as the guardian of people with disabilities when appointed by the Guardianship and Administration Board.

The Board will appoint the Public Guardian in situations where no one else is available or suitable to take on the role of guardian on behalf of a person with a disability. In rare situations, the Board may appoint the Public Guardian as an administrator.

The Public Guardian can play a role in fostering the provision of services and facilities for persons with a disability, and can also support the establishment of organisations which support people with disabilities.

The Public Guardian is also available to assist with the development of any programs that support people with disabilities, including advocacy programs, educational programs, and programs to encourage people to act as guardians and administrators.

The Public Guardian can investigate, report and make recommendations to the Minister on any matter relating to the operation of the *Guardianship and Administration Act 1995*. The Public Guardian can also investigate complaints and allegations concerning the actions of a guardian or administrator or a person acting or claiming to act under an enduring power of attorney.

If requested to do so by the Board, the Public Guardian must investigate and report to the Board in relation to a matter before the Board.

The Public Guardian can deal with anyone providing services to people with disabilities, including government departments and the private sector. The Public Guardian can intervene whenever someone with a disability is being treated unfairly in obtaining the services they require.

¹ Information in this section is taken from the website of the Public Guardian:
<http://www.publicguardian.tas.gov.au/>

2. Guardianship Orders

Appointments by the Guardianship and Administration Board:

The Board will only appoint a guardian in circumstances where:

- a person has a disability, and
- because of that disability, they cannot make reasonable personal and lifestyle decisions, and
- the person is in need of a guardian.

The Board can also register appointments of guardians made in other Australian states and territories. Once a guardianship order from interstate is registered in Tasmania, the Tasmanian laws apply to that appointment for actions undertaken in Tasmania.

Who may be appointed by the Board?

To be considered for appointment by the Board, the proposed guardian must be suitable and willing to be appointed. The proposed guardian must:

- be at least 18 years of age,
- act in the best interests of the represented person,
- not be in a position where his or her interests conflict with the interests of the proposed represented person, and
- be suitable to act as the person's guardian.

In selecting a suitable guardian the Board will take the following factors into account:

- the wishes of the person, as far as they can be ascertained, and
- the desirability of preserving existing family relationships, and
- whether the proposed guardian will be available and accessible to the proposed represented person so as to fulfil the requirements of the guardianship of that person.

The Board will also take into account the compatibility of the proposed guardian with the proposed represented person's administrator and support persons.

The Board may appoint the Public Guardian as a person's guardian where there are no eligible friends or family available for appointment as a guardian for a person.

What is a guardianship order?

A guardianship order is a written legal directive issued by the Guardianship and Administration Board following a guardianship hearing, where the Board has found that a person with a disability requires a guardian to make certain substitute decisions. The Guardianship & Administration Board will provide a copy of the order to the appointed guardian, and to the person to whom the order applies (who is called the represented person under the Act). The Board may also provide copies of the order to other interested parties.

Duration of the order

The guardian's powers begin when the order is made. Once an order is made, it remains in force until it is revoked or varied by the Guardianship and Administration Board, is the subject of a successful appeal, or it expires. The order will specify the date that the order will expire. Most guardianship orders are limited to one year, but the Board can make an initial order for up to three years. If an order is still needed after the expiry date it can be renewed by the Board in a review hearing.

Appeals against orders

The represented person, or any person who is aggrieved by a decision of the Guardianship and Administration Board, can lodge an appeal against a guardianship order or decision made by the Board. An appeal is a challenge to a decision or order. It involves taking the matter to a higher court. Appeals against orders and decisions made by the Board are heard in the Supreme Court.

Reviews of guardianship orders

If the circumstances of the represented person change during a guardianship order, it can be reviewed by the Board who might extend or limit the guardian's powers or revoke the order. A guardian is expected to apply for a review if an order is no longer required.

Are all guardianship orders the same?

No, there are different types of orders giving guardians a range of roles and responsibilities. As people and their situations are unique the Board makes each order based upon individual circumstances. As a newly appointed guardian it is important that you understand the powers that you have been given.

Full orders

A full guardianship order gives the guardian the authority to make decisions in most areas of the represented person's life. This includes decisions about accommodation, health care, services they may receive and general lifestyle matters. It should be noted that a guardianship order does not give the guardian authority to manage the represented person's financial affairs. This is the role of the administrator or the person appointed through an enduring power of attorney if there is one.

Limited orders

A limited guardianship order limits the authority of the guardian to specific duties and roles. These duties will be clearly listed on the guardianship order. The guardian is only legally empowered to carry out the duties set out in the order.

The role and responsibility of guardians appointed by the Board

Obtaining and keeping documents

The Guardianship and Administration Board will mail you the guardianship order shortly after the hearing. It is important that you keep these documents in a safe place once you have them, as they are proof that you have the legal authority to make certain decisions on behalf of the person under guardianship.

Who needs to know that I am the person's guardian?

Depending on the roles and duties you have been given, it is a good idea to inform all the relevant people who support or care for the person for whom you are a guardian. This might include the represented person's doctor, dentist, case manager, and/or accommodation provider. It is also helpful to photocopy the guardianship order or instrument and provide copies to relevant people. You may occasionally be asked to provide a certified copy. If you require a certified copy, you can contact the Registrar at the Board on (03) 6165 7500 and she will provide certified copies for you.

Enforcing a decision

As a last resort, under section 28 of the Act, the Guardianship and Administration Board can make orders that give you or another person the power to make sure that the represented person complies with your decision.

This authority is mainly used in situations where the person is at significant risk, needs to be moved to accommodation or a health care service that is more appropriate, and is refusing to agree.

If you are confronted with such a situation, you should contact the Guardianship and Administration Board for assistance in applying to the Board for a section 28 order.

Can the guardianship order be changed?

If you think that the guardianship order is not working out well, that additional decision making authority is needed, or you are no longer able fulfil your role as guardian, then you can make an application to the Guardianship and Administration Board to have the order reviewed or for advice and direction from the Board. If you are experiencing difficulties in your role as guardian it may be a good idea to discuss these problems with an officer at the Board or the Office of the Public Guardian, or another relevant agency before requesting a review hearing.

Multiple Guardians

The Board can appoint separate guardians to undertake different functions. Joint guardianship appointments by the Board are rare. Clearly it will be in the best interests of the represented person if the guardians work well together and consult each other in decision making. Each guardian is required to report annually to the Board and to attend review hearings.

3. Principles of Guardianship Decision Making

The *Guardianship and Administration Act 1995* (Tas) established principles that guide all powers used under that Act. This means that the principles apply to all decisions and actions that you undertake as a guardian. The principles are:

A function or power conferred, or duty imposed, by this Act is to be performed so that :

- (a) the means which is the least restrictive of a person's freedom of decision and action as is possible in the circumstances is adopted,
- (b) the best interests of a person with a disability or in respect of whom an application is made under this Act are promoted, and
- (c) the wishes of a person with a disability or in respect of whom an application is made under this Act are, if possible, carried into effect.

These principles are summarised as:

- (a) The 'least restrictive alternative'
- (b) The best interests of the person
- (c) The wishes of the person

These principles often conflict with each other and it can be difficult to find a balance between them. For example, it may be difficult to ensure that a person's expressed wish is respected, while ensuring that they are adequately protected from exploitation or abuse. It is not always possible to make a decision that will be acceptable to the person under guardianship and at the same time ensure their proper care and safety.

The challenge of good guardianship is finding a balance between care and protection and encouraging the represented person towards self-determination and independence. In finding a balance, consideration should be given to the individual's capacity, needs and potential for development. People in need of guardianship often require a significant level of protection and assistance; however, it must be remembered that they are also entitled to an environment and support that enables them to have as much control as possible over how they live their own lives.

National Standards of Public Guardianship

The National Standards of Public Guardianship provide the minimum expectations of guardianship staff in making substitute decisions on behalf of people with decision-making disabilities whose guardian is the Public Guardian, Public Advocate or Adult Guardian in each State and Territory. Private guardians are not bound by the Standards but they provide a good guide for the decision making of a private guardian.

The Standards acknowledge and explain the following duties of a guardian, to:

- Provide information

- Seek views
- Advocacy
- Protection
- Make decisions
- Record information
- Participate in guardianship reviews
- Professional development
- Privacy and confidentiality

It is highly recommended that a private guardian read and consider the Standards which can be found at:

http://www.agac.org.au/images/stories/national_stands_public_guardianship.pdf

Before making a decision you might ask questions such as:

- What are the current wishes of the represented person on the matter?
- What is the least restrictive option for the person?
- What options have been considered and tried? What were the outcomes?
- Are there other options that could be considered?
- Will the proposal promote the wellbeing of the person under guardianship?
- Will the decision/proposal, in your view, provide the best outcome for the person?

Making decisions in difficult circumstances:

A guardian is often required to make decisions that are contentious or sensitive. You may have considered all of the above questions and decided on a course of action that is in conflict with the wishes of the represented person and/or with the recommendation of service providers. Unfortunately there is no magic solution for these difficult situations. It is important to be clear with the represented person, and with any others involved, about your reasons for making a particular decision. The nature of your relationship will guide you as to the best way to discuss the issues and your decision with the person. The person may well be angry and upset and need to express this. They may also need some time to adjust to a decision that will mean a significant change in their life.

While it can be difficult dealing with conflict and distress remember that as long as you are acting according to the principles in the Act, then you are doing the best job you can as guardian and are doing what is legally required of you. Being a guardian can be a tough job at times and you need to ensure that you take care of yourself.

Seeking advice

This guide provides general information and assistance but every person and every situation is unique. If you feel you need to discuss an issue then you can contact the officers of the Guardianship and Administration Board or the Public Guardian.

You may also wish to talk with service providers who have specialist knowledge in areas that apply to the situation you are dealing with. It is important to consult with people who have relevant knowledge. The family and friends of the represented person may be able to give guidance about how that person has made decisions in the past. Medical decisions will require appropriate medical advice and you may seek a second opinion or specialist opinions where there is time available and that advice will be useful. Remember that there are a range of specialisations that can assist such as occupational and speech therapists, physiotherapists and other allied medical practitioners who can provide valuable insights from their experience.

Asking the Guardianship & Administration Board for direction

If you have listened to the wishes of the represented person, considered advice from relevant professionals and other service providers and sought independent advice from somewhere such as the officers of the Board or the Public Guardian, and you are still unable to make a decision, you can ask for assistance from the Guardianship and Administration Board.

Section 31 of the *Guardianship and Administration Act 1995* (Tas) allows guardians to make an application to the Board for specific advice and direction. A section 31 application should only be made for major decisions. The Guardianship and Administration Board has the discretion not to give a direction, however if the Board gives a direction under this section of the Act it is binding; that is, the guardian must comply with the decision of the Board.²

² Ibid page 18

Roles and Duties of a Guardian

As discussed in Chapters 2 and 3 above, appointment of a guardian can be limited, conditional or subject to certain directions. Depending upon the types of appointment that you have, you may have full powers or limited powers.

A guardian with full powers has all the powers and duties which the full guardian would have in Tasmania if he or she was a parent and the represented person his or her child. These powers include powers:

An accommodation power - to decide where the represented person is to live, whether permanently or temporarily and with whom,

An employment power - to decide whether the represented person should or should not be permitted to work and, if so, the nature or type of work, the person for whom the represented person is to work, and any related matters.

An access power - to restrict visits to a represented person to such extent as may be necessary in his or her best interests and to prohibit visits by any person if the guardian reasonably believes that they would have an adverse effect on the represented person, and

A health care power - to consent to any health care that is in the best interests of the represented person and to refuse or withdraw consent to any such treatment (except 'special treatment' or treatment of a mental illness – see Chapter 5 (Health Care Powers) and Chapter 6).

A decision made by a guardian under a guardianship appointment has legal effect as if it had been made by the represented person and the represented person had the legal capacity to do so. This means that the guardian may, on behalf of a represented person, sign documents and do all such things as are necessary to give effect to any power or duty vested in the guardian.³

If a guardian has been appointed with limited or conditional powers, they might relate to one or more of the powers listed above. For example, many guardianships are limited to making health care decisions in end-of-life situations. Therefore a guardian who has only been granted these powers could not decide accommodation matters unless they were granted extra powers by the Guardianship and Administration Board in a hearing to review the power or for advice and direction.

This Handbook will consider the decision making powers in turn.

³ Section 25(1) *Guardianship and Administration Act 1995*(Tas)

Making Decisions under Accommodation Powers

When a guardian is given an accommodation role, the guardian has the authority to decide where the represented person lives and with whom. The guardian may need to make decisions about temporary and/or long term accommodation. This might include decisions about permanent or respite care in an aged care facility, or accommodation in a group home or supported residential facility.

A guardian may apply to a medical practitioner for an assessment order under the *Mental Health Act 2013* to have a represented person with a mental illness admitted to a mental health facility, but otherwise does not have power to authorise a person with a mental illness to be detained in an approved hospital for treatment of a mental illness.

Accommodation decisions may also include deciding when or where the represented person goes for overnight visits. This may include overnight visits to family and friends. In accordance with the principles contained in the Act, the guardian must consult with the person under guardianship, to whatever degree is possible, about preferred living arrangements. Wherever possible the person's wishes should be respected. However, a guardian can override those wishes in circumstances where the guardian does not believe that they are in the best interest of the represented person.

Decisions made by the Board about accommodation can be read at:

<http://www.austlii.edu.au/au/cases/tas/TASGAB/>.

Relevant decisions include: *BO (Guardianship and Administration)* [2003] TASGAB5, *WT (Guardianship)* [2004] TASGAB 8, *HDH (No 1) (Guardianship)* [2005] TASGAB 2.

Residential care

Many guardianship orders with an accommodation role relate to the transfer of people from their own home to a nursing home or accommodation where there are staff members to assist with personal care, for example, a supported residential facility.

Moving home can be traumatic and usually people do not do this unless they want to or have no other choice. Some elderly people may have lived in one home for many years and it can be very distressing if they have to move due to ill health, personal safety, or because they cannot be supported there anymore. As it can be a difficult decision for a guardian to move someone from their own home, especially if this is against their wishes, it is advisable to obtain a professional assessment of the situation, if you have not already done so.

For example, if an elderly person is living at home, an Aged Care Assessment Team (ACAT) can provide an assessment that will give recommendations as to what is required, in the way of supports services and aides, for the person to remain at home. The ACAT team may also advise you on why it is not safe or suitable for the person to remain at home and give suggestions regarding what would be the most suitable type of accommodation.

Similar assessments are also available for people who are in hospital, usually with the assistance of a social worker or other health professional attached to the ward.

What should I consider when making a decision about accommodation?

The following checklist may be helpful to guardians when making accommodation decisions. The list covers a range of possibilities and not all will apply to each individual situation; you will need to take from it whatever applies to the decision you have to make.

If the person's wish is to remain in their own home, can management and supports be altered to achieve this? Have all the options for home support been fully explored? If the represented person has to move to alternative accommodation:

- What choices of accommodation are available?
- Does the represented person have a preference for any particular accommodation or facility?
- What is the physical layout of the accommodation and how suitable is it for the needs of the person?
- Is there provision for privacy?
- Is the accommodation close to family and friends and/or will it enable existing personal links to the community to be maintained?
- What possessions can the person take with them?
- Are there unnecessary restrictions like locked areas?
- Are there regular outings or activities that are sufficiently stimulating for the represented person?

As guardian you can:

- Arrange to visit the proposed accommodation.
- Consent to the accommodation on a respite basis.
- Request a meeting, or case conference, with service providers who are involved with the represented person to discuss options and/or any concerns.

What if I am unhappy with the accommodation offered?

As *guardian* you do not have to consent to any accommodation that you do not think is suitable for the *represented person*. If you are unhappy with the accommodation options given, you might:

- Discuss your concerns about these options with the worker/agency.
- Suggest other accommodation options that you would like them to consider.
- Consent to temporary/respite accommodation until a more suitable permanent placement becomes available.
- If this does not achieve the desired outcome, then a more formal complaint in writing, outlining your concerns could be made to the *service providers* on behalf of the person under guardianship

Making Decisions under Employment Powers

Guardians are rarely appointed with employment powers as most people who are able to be employed have sufficient capacity to make reasonable personal decisions. The employment power was created for guardians at a time when there had been scandals nationally and internationally about abuse conditions in “sheltered workshops” for people with psychiatric and intellectual disabilities. Presumably guardians would be required to remove people with disabilities from abusive sheltered workshops for their protection.

Supported workplaces have improved in the conditions and respect for people with disabilities in the years since the *Guardianship and Administration Act 1995* was passed and applications under this power are extremely rare.

One example arose where an employment power was required where a person seeking rehabilitative employment had specific disabilities that needed to be explained in detail to prospective employers so that reasonable adjustments for that person’s disability might be implemented. A guardian was appointed to authorise the rehabilitation providers to disclose sensitive personal information about the person with a disability to prospective employers. You can read the Guardianship and Administration Board’s decision in this matter called *HI (Guardianship) [2008] TASGAB 8* at <http://www.austlii.edu.au/au/cases/tas/TASGAB/>.

Making Decisions under Access Powers

An access role is given to a guardian when there is a need to decide with whom the person with a disability should have contact.

An access role gives you the authority to:

- Decide who can visit the represented person, and who the represented person can visit.
- Decide who the represented person can have contact with via telephone or other electronic communications.
- Decide when such visits/contact should occur, for how long, and in what circumstances.

It is a serious decision to refuse or limit contact between the represented person and other people. The person has the right to see, or have contact with, whoever he or she wishes to. However, the person also has the right to be protected from undue pressure from others and from conflict or abuse.

When making a decision about access you could consider:

- Does the person under guardianship want to have contact with a particular person?
- Does the contact have a negative impact on the person under guardianship?
- What, if any, are the benefits of the represented person having contact with a particular person?
- If there are benefits, under what circumstances could contact be arranged to ensure the represented person is not exposed to risk?

Decisions made by the Board about access can be read at:

<http://www.austlii.edu.au/au/cases/tas/TASGAB/> .

Access was specifically considered in: *HDH (No 1) (Guardianship) [2005] TASGAB 2*.

Restraint Orders and Family Violence Orders

Where a guardian is particularly concerned that a certain person or persons need to be restrained to keep away from the represented person otherwise the represented person may come to harm, the guardian can apply to the Magistrates Court on behalf of the represented person for a restraint order or a family violence order. If granted by the Magistrate, a restraint order or a family violence order against a particular person means that if they should breach the terms of the order (e.g. not to approach the represented person in his or her home) then the person may be arrested and charged with a summary offence. For further information about seeking restraint orders or family violence orders call the **Legal Aid Commission of Tasmania** where free legal advice is available between 9am and 5pm Monday to Friday on 1300 366 611 or the **Victims of Crime Service** in Burnie on (03) 6477 7133, Hobart (03) 6165 7524, or Launceston (03) 6777 2937.

Consent to Medical Treatment and Other Health Care

Where a person lacks capacity to understand the nature and effect of medical treatment, a 'person responsible' can give consent on behalf of that person.

If you have been appointed as a guardian for a person, you will automatically assume authority as their 'person responsible' meaning that only the guardian can give valid substitute consent on behalf of a person who by reason of his or her disability cannot understand the nature and effect of medical treatment.

Section 4 of the Act defines a person responsible for an adult as:

"4. Meaning of "person responsible"

(1) In this Act, person responsible for another person means –

...

(c) where the other person is of or over the age of 18 years, one of the following persons, in order of priority:

(i) his or her guardian;

(ii) his or her spouse;

(iii) the person having the care of the other person;

(iv) a close friend or relative of the other person." (emphasis added)

Section 3 defines the term 'guardian' as:

"guardian means a person named as a guardian in a guardianship order or as an enduring guardian in an instrument of appointment as such" (emphasis added)

A person 'named as a guardian' will exercise the authority of a 'person responsible' whether or not he or she has been appointed with specific powers to make decisions about 'health care'. In other words, a limited guardian will always impliedly bear the authority of a 'person responsible' for a person with a disability, even where he or she has not been expressly so appointed.

Relevant publications include:

4. Consent to Medical or Dental Treatment (Facts Sheet)
 5. Consent to Medical Treatment by a Person Responsible (Facts Sheet)
- Understanding the Person Responsible (Policy)

These can be found in the Publications page of the Board's website which is:

<http://www.guardianship.tas.gov.au/home>

As a 'person responsible,' a guardian can:

- Give or decline consent to health related interventions and procedures/treatments, for example, examinations, assessments, diagnostic procedures, health care monitoring and certain minor and major procedures, including most surgical procedures (see Chapter 5 What can't a Guardian Decide).
- Give or decline consent to the represented person being given certain medications (see Chapter 5 What can't a Guardian Decide).
- Give or decline consent to the represented person attending medical and other health care appointments.
- Decide from which health care services, or professionals, the person under guardianship will receive a service, such as who the person's general practitioner, dentist and psychiatrist should be.
- Request access to information that is relevant to the proposed treatment (this includes access to medical notes if the person is in hospital).
- Consent to the provision of palliative care where appropriate.
- Consent to the withdrawal of treatment, including end of life treatments.

Making decisions about medical treatment on behalf of another person is a serious responsibility and it may be helpful to you as a new guardian to do some of the following:

- Obtain a good knowledge of the represented person's disability and its effect.
- Obtain as much medical history as you can about the represented person.
- Contact the person's general practitioner and any other health care providers to ensure that they are aware of your involvement and legal responsibilities.
- Ascertain what health care services the represented person is currently receiving and from whom. In your opinion are these adequate?
- Identify whether the person is receiving any prescribed medications and whether these have any detrimental side effects.
- Arrange for a regular medical check-up (including dental) if this is appropriate.
- Ensure that contraceptive measures are adequate for the represented person's needs.
- Request a treatment plan or case plan from the health care service providers working with the represented person.

Some useful questions

If you are asked to consent to treatment on behalf of the person under guardianship you must consider the following issues:

- What is the person's diagnosis?
- What does it mean?
- What is the doctor proposing to do about it?
- What is the purpose of the procedure/treatment being recommended – to cure, relieve symptoms or investigate further?
- What will the likely outcome of the procedure be?
- Will there be any pain or discomfort for the person?
- Are there any side effects/risks and how likely are they?

- Are there any alternatives?
- What would happen if the treatment wasn't given?
- What are the represented person's wishes?

Most of the answers to these questions will come from the medical practitioners or other relevant health care professionals.

Some other questions you may like to ask a medical practitioner about medication when you have been asked to consent on behalf of the represented person are:

- What is the name of the medication?
- How does it work?
- What happens if the person does not take it?
- How long does the person need to take the medication?
- Is it habit forming?
- When and how should it be taken?
- How long will it take to work?
- What will happen if it does not work?
- Are there any side effects and how likely are these?

If you have concerns about the type, or amount of medication, the person under guardianship is receiving you can request a medication review or a second opinion.

Appointment as a guardian with "health care" powers:

If you have been appointed as a guardian with powers to consent to or refuse health care on behalf of the represented person, you may have powers to consent to health services that are broader than 'medical treatment'.

'Medical treatment' under the Act is defined as: "medical treatment ... normally carried out by, or under, the supervision of a medical practitioner". In other words, medical treatment only means treatment given by a medical practitioner. It excludes treatment by nurses, physiotherapists, occupational therapists, dietary counsellors etc.

"Health care" as it appears in section 25(2)(e) of the *Guardianship and Administration Act 1995*, is not defined in the Act but appears to be an umbrella term that could encompass care provided by allied medical practitioners, for example, psychological counselling, physiotherapy and other forms of physical and mental rehabilitation not provided by medical or dental practitioners. A guardian appointed with "health care" powers will have broader powers to consent to the provision of allied health services, nutrition plans, exercise regimes and any matters related to the represented person's general health, as well as having the power to consent to medical treatment.

The principles of the Act and medical treatment or health care decisions

The guardian's role is to promote the represented person's optimum health and wellbeing, however, remember that in accordance with the principles of the Act, the person's wishes must be considered. Any decision should resemble as closely as possible what the person would have chosen for himself or herself if still capable of deciding.

Whenever possible:

- Explore the represented person's capacity to know and understand the nature and effect of the medical procedure or treatment proposed.
- Discuss options regarding treatment with the represented person and ascertain current wishes in relation to these.
- Once made, discuss the reasons for your medical treatment and health care decisions with the represented person. Encourage the represented person to take responsibility for his or her own medical treatment and health care whenever possible.

Palliative care and End-of-Life decisions

As we have already discussed, a guardian with a health care role can refuse treatment on behalf of the represented person. If the person under guardianship is dying, the guardian may be asked to make a decision about whether treatment should continue or whether the person is better served by the provision of palliative care. This decision should be made in consultation with the represented person's doctor and after discussion, if possible, with the represented person, family members and friends. If the represented person is unable to express a wish, consideration should be given to any wishes regarding end of life decisions that may have been expressed prior to becoming incapacitated, if this is applicable.

A guardian does not have authority to consent to euthanasia which is illegal in Tasmania.

Guardians may be appointed specifically to deal with end of life situations. All of the information above will be a guide to how you make these decisions. What you should also be aware of is that in end-of-life decisions, you will also have to deal with a significant amount of personal grief. This is not something to be ashamed of, but an important factor in decision-making and one that you should acknowledge and understand. There are many people who can support you and assist you to understand the role of grief in your decision-making. These people include: staff at the Guardianship and Administration Board and the Office of the Public Guardian, hospital social workers, grief counsellors, religious advisers (priests, deacons, elders etc.), friends and family.

If you feel that your grief is overwhelming your ability to make a decision, you should apply to the Board for advice and direction or for a review of your appointment.

Medical trials

A medical trial is a term used to describe a process that involves a new and experimental medical treatment being offered to people. As the results of such treatments are usually still being evaluated guardians should generally not consent to the person under guardianship being part of a medical trial.

Consent may be considered if:

The drugs or techniques being tested in the clinical trial are intended to cure or alleviate a particular condition which the represented person may suffer, and there is no other as effective, medically approved alternative drug or treatment; AND The trial will not involve a great risk to the person; AND After considering the potential benefits and risks, you believe it would be in the best interests of the person to take part in the trial.

The guardian's powers under the *Mental Health Act 1996*

A guardian may apply to a medical practitioner for an assessment order under the *Mental Health Act 2013* to have a represented person with a mental illness admitted to a mental health facility , but otherwise does not have power to authorise a psychiatric treatment of person with a mental illness. If a represented person requires treatment for a mental illness and does not understand the nature and effect of that treatment, such treatment must be authorised under the *Mental Health Act*.

For more information, please contact the Mental Health Tribunal on (03) 6165 7491 or the Mental Health Services Helpline 1800 332 388.

Other Guardianship Powers

The guardianship order will specify what powers you have as a guardian. Unless it is specified in the order, you do not have any assumed powers other than the role of 'person responsible' (see above).

Common guardianship powers might include:

A power to arrange and co-ordinate support services to attend to the represented person's home

A guardian with this power ought not to be confused with the role of a Case Manager. Usually a case manager will coordinate the necessary support services for a person with a disability. However, at times a person with a disability may have had a history of refusing to allow access into their home to deliver or provide such services. In these cases, a guardian is appointed with powers to overcome the person's objection to ensure that they receive the health care and support services that they require.

Consenting to a behaviour management plan⁴

As a guardian you may be asked to consent to, or make decisions about, a behaviour management plan for the represented person. A behaviour management plan usually refers to a number of agreed strategies that will assist and support the person to communicate wishes and needs more effectively. A good behaviour management plan should create an environment that responds to the represented person's needs in a positive way, and which ultimately leads to an improved quality of life.

Any behavioural interventions should begin with a thorough assessment of the individual's interaction with others and the environment, and should be reviewed on a regular basis.

As a guardian you can:

- request a copy of any behaviour management plan,
- request a *case conference* or meeting to discuss the plan,
- give or decline consent to the plan, or particular parts of the plan that you feel would not be of benefit to the person, or are of concern to you,
- request a review of the plan from a specialist, e.g. a behavioural psychologist, working in this area.

In keeping with the principles of the Act any behaviour management plan should be the least restrictive of the represented person's personal freedom and autonomy.

A power to undertake certain litigation

This power arises where the represented person lacks the capacity to give instructions to a solicitor in a legal action where he or she may be entitled to claim damages or an inheritance from a deceased estate. Usually such powers would be given to an administrator not a guardian, but at

⁴ Ibid page 32

times the administrator may have a conflict of interests with regard to the litigation and a guardian would be appointed instead.

Other litigation might include:

For example:

Restraint Orders or Family Violence Orders: An application for a restraint order or a family violence order relates to the powers of a guardian to 'restrict visits to a represented person to the extent as may be necessary in his or her best interests.'

Family Court – Children's Matters: Proceedings in the Family Court or Federal Magistrates Court of Australia relating to a child or children of the represented person, for instance where the represented person's children live and whether the represented person may visit them relates to decisions about 'with whom the represented person is to live.' The guardian can only make decisions relevant to the represented person in the process of litigation. The relevant court or authority will determine decisions about that person's children.

Child Protection: Where the represented person has an interest in proceedings for a Care and Protection Order under the *Child, Young Persons and Their Families Act 1997* this relates to his or her 'person and circumstances'. As above, the guardian can only make decisions relevant to the represented person in the process of litigation. The relevant court or authority will determine decisions about that person's children.

Mental Health Act: A guardian may apply to a medical practitioner for an assessment order under the *Mental Health Act 2013* to have a represented person with a mental illness admitted to a mental health facility.

Where legal proceedings involve both financial and non-financial aspects (for example an action for Worker's Compensation) of a represented person's or a proposed represented person's life, an applicant should apply for the appointment of an administrator.

The Board has produced guidelines on the website about the role of guardians and administrators in litigation. See the Board's website <http://www.guardianship.tas.gov.au/> (publications) for further details.

Ensuring privacy and confidentiality

To ensure appropriate standards of privacy and confidentiality guardians are expected to:

1. Protect the privacy and confidentiality of the represented person and the key people in their lives
2. Ensure that the guardian releases only information relevant to the carrying out of the decision.

You should also be aware that section 86 of the Act states that a person must not disclose any information that deals with the personal history or records of a represented person **which was obtained by the Board or the Public Guardian** except where such disclosure occurs at a hearing or has been approved by the Board, the President of the Board or the Public Guardian. A person who contravenes this section is guilty of an offence and is liable on summary conviction to a fine not exceeding 20 penalty units or imprisonment for a period not exceeding 12 months or both.

See Chapter 7 for further discussion about release of information.

6. What can't a Guardian Decide?

As we have already discussed, as a legally appointed guardian, you have authority to make decisions only in the areas specified by the guardianship order. There are however some decisions that the law does not allow any guardian to make on behalf of another.

A guardian cannot:

Vote in an election on behalf of the person under guardianship.

Make decisions concerning marriage.

Make decisions about the represented person's children.

Consent to a "special treatment."

Special Treatments are defined under the *Guardianship and Administration Act 1995* as:

- treatments likely to lead to infertility
- termination of pregnancy
- removal of tissue for transplant
- psychosurgery
- any treatment involving an aversive stimulus

Only the Board can give consent to *Special Treatments*.

Consent to treatment of a mental illness

Consent to treatment of a mental illness is governed by the *Mental Health Act 2013*. A guardian cannot give consent to treatment, but a guardian can ask a medical practitioner to apply an assessment order to have a person taken to a mental health facility.

Make decisions relating to the person's finances – this is the role of an administrator or an attorney acting pursuant to an enduring power of attorney if there is one.

Make a will on behalf of the person under guardianship.

If a person with a disability has no purported will, the Guardianship and Administration Board may make a statutory will for them in special circumstances. Where the person with a disability has a purported will but it requires amendment, an application must be made to the Supreme Court of Tasmania. See the Board's website for Facts Sheets about Statutory Will applications.

7. Working with others – Relationships and Networks

As a guardian your primary responsibility is to the represented person. All of your decisions must consider his or her wishes, his or her best interests and the least restrictive alternative. However, as part of the consideration of his or her best interests it may be important to include persons in the represented person's broader social network as their views may assist to inform your decision.

It is important to recognise the value of the represented person's existing relationships and networks, particularly family and friends, and work closely with them as far as possible. You should also try to maintain positive and effective relationships with all the professionals and service providers involved, to ensure the best possible outcomes for the person under guardianship. This does not mean that you will necessarily consent to their recommendations, but that you should consider their views and recommendations carefully before deciding on a course of action.

A person under guardianship may have a number of service providers assisting them; this could include a case manager, medical practitioners, social workers, disability advocates and care workers. The person may also have an administrator, or an enduring power of attorney, who is responsible for management of financial affairs. There may be many situations where it will be necessary for you to consult these persons together and good communication will contribute to good decision making. For example, a decision to place an older person in a residential care facility involves the personal decision around the placement. This decision is made by the guardian. However there are also financial and contractual decisions related to fee payment and resident's contracts. These decisions are made by the administrator or power of attorney. The guardian will need to work with the administrator or power of attorney in order to ensure that the proposed accommodation decision has financial support.

Remember when working with others that your responsibility as a guardian is as a decision maker and consent giver in the areas for which you have been given authority. A guardian provides professionals and service providers with someone they can turn to for a decision, instructions or consent in specific areas. The ongoing direct care, support and case management remain the responsibility of case managers and direct service providers.

The represented person's family

The represented person's family can be a valuable source of information for the guardian in assisting you to ascertain:

- The represented person's day to day or long term needs,
- The personal history of the represented person, and
- Historical preferences that the represented person may have between particular personal issues.

For that reason, as a guardian it is sensible to consult with members of the represented person's family regularly and especially in relation to any major decisions. However, at times

the information may only flow one way – that is from the family to the guardian. At times it is not appropriate for the guardian to disclose personal information about the represented person to anyone except the represented person himself or herself.

As a guardian, personal decisions are your responsibility. Family members are a source of advice, but they cannot dictate the decisions that you will make. You will need to act with discretion around issues such as:

- Disclosing any sensitive information about the represented person's relationships and sexuality;
- Being seen to favour any particular family members to the detriment of any others;
- Engaging in unhelpful conflict that disadvantages the represented person.

Some families become involved in internal conflicts and might not have the represented person's interests foremost in their minds. Where there is protracted conflict (for instance if members of the family disagree about where the represented person should live), it may be necessary to refer the conflicting parties to mediation services to attempt to resolve long standing conflicts in the best interests of the person. However, as guardian, you make the final decision in the represented person's best interests, regardless of any outcome from mediation.

Unless it is expressly specified in the order appointing you as a guardian, you do not have any duty to provide any personal information about the represented person to any member of his or her family.

You have a duty to the represented person to protect their privacy, as you would with your own affairs. Therefore, if you believe that disclosing the details of the represented person's personal affairs will not add any benefit to the wellbeing of the represented person, you should not make any disclosure.

8. Accountability, Reporting and Review of Guardians

Guardians are accountable to the person that they represent for the decisions that they make. Guardians are also accountable to the Board from time to time, when the Board orders reports and hears applications to review appointments.

Reporting by Guardians

Pursuant to section 66 of the *Guardianship and Administration Act 1995* the Guardianship and Administration Board requires the guardian of a represented person to provide an annual report to the Board. You are required to provide detailed reports at other times when requested by the Board. A member of the Board's staff will alert when you the report is nearly due and provide you with the forms if necessary.

Appendix A has a sample reporting document that may be a useful guide to you as a guardian in preparing reports.

Review of Guardians

The duration of your guardianship appointment, and when it should be reviewed, is written into the order. Any person can apply for a review of the guardianship order prior to its expiry.

When an order is nearing its expiry, a guardian will be required to provide the Board with a written review application and a fresh Health Care Professional Report if he or she wishes for the order to continue.

Guardians participating in guardianship reviews must meet the following standards:

1. Request a review of the current guardianship order, if the guardian believes a cancellation (revocation) of the order or a change in the order will help promote or safeguard the welfare and interests of the represented person.

Prior to the review, guardians will:

2. Provide a report to the Guardianship and Administration Board detailing the decisions made and a recommendation regarding the continuing need for a guardianship order. Where possible, the guardian's report should be in writing.

In preparing the report, guardians will:

3. Consult with the represented person, as far as possible, to determine their views
4. Consult with relevant key parties and include their views in the report

5. Recommend the continuation of the guardianship order only where there is evidence that the represented person currently needs decisions to be made on their behalf, and where guardianship can help achieve outcomes for the represented person.

At a review hearing, the Board considers the same elements as it did in the original application (see Chapter 2 for more details). However, review hearings are also an opportunity to consider how the guardianship is working out and to resolve any communication or other difficulties that are arising in the appointment.

9. Useful Contacts

Guardianship and Administration Board

Level 2, 144 Macquarie Street
Hobart 7000

Or

GPO Box 1307
Hobart 7001

Freecall: 1300 799 625
Telephone: (03) 6165 7500
Facsimile: (03) 6173 0211

Email: guardianship@justice.tas.gov.au
Website: www.guardianship.tas.gov.au

<p>The Public Trustee</p> <p>Hobart 116 Murray St Hobart TAS 7000 Tel (03) 6235 5200</p> <p>Launceston Ground Floor, 33 George St Launceston TAS 7250 Tel (03) 6335 3400</p> <p>Burnie Columnar Crt, 22 Wilmot St Burnie TAS 7320 Tel (03) 6430 3600</p> <p>Devonport 1st Floor, Bass House Cnr Edward & Best Sts Devonport TAS 7310 Tel (03) 6430 3690</p> <p>http://www.publictrustee.tas.gov.au/index.php</p>	<p>The Public Guardian</p> <p>Level 1, 54 Victoria Street Hobart Tas 7000</p> <p>GPO Box 825 Hobart Tas 7001</p> <p>Tel (03) 6165 3444 (Please call in business hours)</p> <p>Email: public.guardian@info.tas.gov.au</p> <p>Web: http://www.publicguardian.tas.gov.au/home</p>
<p>Tasmanian Government - All Departments www.directory.tas.gov.au</p> <p>Service Tasmania - 1300 135 513</p>	

Appendix A – Report forms for Guardians

Date of report	
Represented Person	Name: Address:
Guardian:	Name: Address:
Date of the Order:	
GAB Ref. No	

Full or Limited Order (If Limited State the Subject Matter of the Order):

<p>Disability and Incapacity</p> <p><i>Has there been any significant change in the represented person's disability or the represented person's capacity to make reasonable judgements in respect to all or part of his or her estate?</i></p>	
<p>Living and Family Situation</p> <p><i>Briefly describe any changes to the represented person's living situation. For example have there been any major changes in the represented person's:</i></p> <ul style="list-style-type: none"> • accommodation • relationships with other family members • care arrangements or respite needs • any significant health problems • hobbies and other daily activities • provision of services, e.g. case manager involvement, assisted employment 	
<p>Immediate and Future Plans</p> <p><i>Are there any plans for the immediate and future management of the represented person's estate or to enhance his or her quality of life?</i></p>	

Details of Decisions Made as Guardian and Reasons for Decisions:

(attach extra pages if necessary)

Who I have consulted in making these decisions:

Name:	Relationship	How consulted	Date of Consultation
			/ /
			/ /
			/ /

Who I attempted to consult but was unable:

Name:	Relationship	How consultation attempted	Dates attempted
			/ /
			/ /
			/ /

Any other matters you believe should be brought to the attention of the Board:

Signed: **Guardian** **Date:**

Index

- Access Powers, 21
- Accommodation Powers, 18
- Acknowledgements, 3
- advice and direction, 13, 16, 17, 25
- Appeals against orders, 12
- best interests of the represented person, 14
- conflict, 15
- Copyright notice, 3
- Disclaimer, 3
- Duration of guardianship order, 12
- Employment Powers, 20
- Enforcing a decision, 13
- family and friends, 31
- finances, 30
- financial decisions, 7
- full guardianship order, 12
- Guardian with full powers, 17
- guardian with limited or conditional powers, 17
- guardian's powers under the *Mental Health Act 1996*, 26
- Guardianship and Administration Board, 9, 35
- human rights, 7
- informal arrangements, 8
- interstate appointment of guardians, 11
- least restrictive alternative, 14
- Legal Aid Commission of Tasmania**, 21
- limited guardianship order, 12
- litigation, 27
- marriage, 30
- Medical trials, 25
- Mental Health Act**, 28
- Multiple Guardians, 13
- Obtaining and keeping documents, 13
- Palliative care and End-of-Life decisions, 25
- President, 9
- Principles of Guardianship Decision Making, 14
- privacy, 32
- privacy and confidentiality, 29
- Public Guardian, 10, 11
- Report forms for Guardians, 36
- Reporting by Guardians Appointed by the Guardianship and Administration Board, 33
- represented person's children, 30
- represented person's family, 31
- represented person's will*, 30
- Residential care, 18
- Restraint Orders, 21
- review hearing, 13
- Review of Guardians, 33
- service providers, 31
- "special treatment.", 30
- statutory will, 30
- Substitute Decision Making, 7
- Substitute decisions
 - substitute decision makers, 7
- support services, 27
- Voting, 30
- wishes of a person with a disability, 14