1. Introduction to guardianship

What is guardianship?

The Guardianship Act 1987 (NSW) was introduced as a result of significant lobbying by people with disabilities and those from community and government organisations, who were concerned about the lives of people with a disability. The Act was created to protect the legal rights of people over the age of 16 years who have a disability that affects their capacity to make decisions, and to enable decisions to be made on their behalf.

Guardianship is when a person is appointed under the Guardianship Act to make decisions on behalf of another person who lacks decision-making capacity because of a disability. Most people with disabilities do not need guardians, and can be supported to make their own decisions. Guardianship is the last resort.

Guardianship is limited to current need and is not intended to last forever. Substitute decision-making is a formal appointment and is not assumed by relationship.

Who might need a guardian?

In some instances, a person’s disability affects their capacity to make personal and life choices and decisions for themselves. If this person does not have anyone who can help, or their family or friends disagree about important matters, they may need someone who will act in their best interests and make decisions on their behalf.

DID YOU KNOW?

A guardian cannot make a will on behalf of the person they represent, vote on their behalf, or consent to their marriage or divorce.
What is a guardian?

A guardian is a person appointed under the Guardianship Act to make legally valid decisions on behalf of a person with a disability who is unable to make decisions on their own or without support. A guardian can be appointed by the Guardianship Tribunal or by a legal process known as enduring guardianship.

A guardian will usually be authorised to make decisions on behalf of another person in specific area(s) of the person’s life, for a certain length of time. In guardianship, an area of decision-making authority is called a function.

Guardians are appointed to make health and welfare decisions on behalf of the person under guardianship. They cannot make decisions about financial matters or the person's estate unless they have been authorised under an enduring power of attorney or have been appointed by the Guardianship Tribunal, the Mental Health Review Tribunal or the Supreme Court as the person's financial manager.

In appointments made by the Guardianship Tribunal, anyone can apply to become a guardian. In the first instance the Tribunal will consider appointing a relative, friend or unpaid carer of the person, who is willing to make decisions in the best interests of the person with a disability.

Who is the Public Guardian?

When there is no private person who can be appointed guardian, the Tribunal will appoint the Public Guardian to make decisions on behalf of the person with a disability. The Public Guardian is only appointed as ‘the guardian of last resort’. This usually happens when no one is available or willing to act as a guardian, or where there is conflict within the family about legal decisions in relation to the person under guardianship.

The Public Guardian may also be appointed jointly with a private guardian but only with different functions (areas of decision-making).
What is joint guardianship?
Sometimes, depending on the circumstances, the Tribunal will appoint more than one guardian for a person. There are a number of ways the Tribunal might appoint different people to be guardians for the same person. For example:

> appointed jointly - two or more guardians (but not the Public Guardian) can be appointed to share the same function(s). If you are appointed in this way you need to make decisions together; or

> appointed separately - two or more guardians might be appointed with different functions. If you are appointed in this way you make decisions separately but it is a good idea to keep each other informed about the decisions being considered or that have been made; or

> a guardian might be appointed with one or more functions, and the Public Guardian can be appointed with one or more functions that are different to the guardian. (A private guardian and the Public Guardian cannot be appointed to share the same function). If you are appointed in this way it is a good idea to stay in touch with the Public Guardian about decisions being considered or that have been made.

What is an alternative guardian?
Sometimes, the Tribunal will appoint an alternative guardian for the person with a disability at the same time as it appoints a guardian. The alternative guardian is like a back-up. They only make decisions if the other guardian is not able to due to absence or incapacity.

Case Study
Mr Tan, 87, lives alone and has Alzheimer’s disease. His two children are appointed as guardians with the joint functions of medical/dental consent, services and health care. As joint guardians they need to agree and make decisions together.

An accommodation function was given to the Public Guardian. The Guardianship Tribunal appointed the Public Guardian with an accommodation function because Mr Tan’s children, while very caring and supportive of their father, could not reach an agreement about where he should live.
Introduction to guardianship

Enduring guardianship

What is an enduring guardian?
An enduring guardianship appointment is a legal document where you nominate someone to make health and welfare decisions for you, for example where you live and the health care you receive. ‘Enduring’ means it continues (endures) when you are unable to make these types of decisions for yourself.

As an enduring guardian you can start making decisions when the person who appointed you loses capacity. Your decisions have the same legal force as a guardian appointed by the Guardianship Tribunal.

How does it work?
Like guardians appointed by the Guardianship Tribunal, an enduring guardian:

- can only consent to medical and dental treatment that will promote or maintain the health and well-being of the person
- cannot make or alter a will on behalf of the person under guardianship
- cannot vote or consent to marriage on behalf of the person under guardianship
- cannot consent to medical or dental treatment on behalf of the person under guardianship where the person is objecting to that treatment. Only the Guardianship Tribunal can give this authority, after specific discussion at a guardianship hearing
- cannot consent to treatment that is defined as special medical treatment. Only the Guardianship Tribunal can consent to special treatment
- cannot make decisions that are against the law. For example, euthanasia is illegal in all states and territories of Australia.
As with guardians appointed by the Tribunal, enduring guardians do not make financial decisions. An enduring guardian may have been appointed as a financial manager or enduring power of attorney as well, but these are different roles.

Unlike guardianship orders made by the Guardianship Tribunal, enduring guardianship appointments are not time-limited, are not automatically reviewed by the Tribunal and are not registered.

**Directions**
When appointing an enduring guardian, the person can give the intended guardian directions about the kinds of decisions that should be made. As long as the directions were made as part of the witnessed appointment, and are relevant to the decision that needs to be made, they are binding directions. You will need to make yourself familiar with any directions that have been included in the form appointing you as enduring guardian.

**Disagreements**
If there are concerns about the welfare and well-being of a person under an enduring guardianship form of appointment, anyone with a genuine concern for the person can apply to the Guardianship Tribunal to review the appointment. The Tribunal can then review the person’s situation and any appointment made at a hearing and based on the findings, may then uphold, vary, revoke or suspend the appointment; adjourn the hearing; or make a guardianship order.

**When does enduring guardianship end?**
Enduring guardianship ends when the person under guardianship dies or the guardian resigns, or it is revoked by the person who made the appointment (while they have capacity), the Guardianship Tribunal or the Supreme Court. When appointing joint enduring guardians, the person can state clearly that they wish the appointment to continue if one of the joint guardians dies, resigns or becomes incapacitated. If this is not specifically stated, a joint enduring guardianship appointment will end if one of the joint enduring guardians dies, resigns or becomes incapacitated.

**Interstate recognition**
Enduring guardianship forms of appointment set up in NSW are only valid in NSW. If the person under guardianship moves to another state or territory, you would need to seek recognition of your appointment from the equivalent Guardianship Tribunal body in the state or territory the person has moved to. You can contact the guardianship agency in the state or territory in which the person lives or the Private Guardian Support Unit for more information.

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**Case study**
Mrs Griffin appointed her daughters Jean and Susan as her enduring guardians, and has since developed dementia. However, Jean and Susan disagree about their mother’s capacity to decide about the services she receives at home. Jean believes her mother now lacks capacity to make decisions and therefore, their appointment as their mother’s enduring guardians should now take effect. Susan acknowledges that her mother’s condition is getting worse, but she feels her mother can still make her own decisions.

Jean and Susan request that Mrs Griffin’s doctor assess her capacity to make her own decisions. After the assessment, the doctor is satisfied that Mrs Griffin lacks capacity to make her own decisions about what services she needs. Susan and Jean begin making decisions as Mrs Griffin’s enduring guardians.
Capacity

Capacity is the ability to make decisions for yourself. People who have capacity are able to decide what is best for them and can take or leave the advice of others.

Broadly speaking, when a person has capacity to make a particular decision, they are able to understand the facts and choices involved, weigh up and understand the consequences of choices and communicate their decision. If a person can’t follow this process, they are said to lack capacity.

A person may lack capacity temporarily, or may be able to make some decisions but not others, or may regain capacity.

Capacity is decision-specific. It is rare for a person to not have any decision-making capacity and more often people lack capacity in making one type of decision.

- global capacity – where a person is capable or incapable of making all decisions
- domain specific capacity – where a person has capacity in one domain for example health care, but lacks capacity in another domain, for example finance
- decision specific capacity - where a person could be capable of making simple decisions within a particular area or domain but not capable of making complex decisions within the same domain¹.

Who decides if the person lacks capacity?

Disability alone does not indicate a lack of capacity. A person with a disability may still be able to make his or her own decisions without assistance, or with support.

An eccentric life, poor or controversial personal decision-making may not mean that the person lacks capacity. We may not agree with another person’s decisions. What must be determined is whether the person is simply making ‘bad’ decisions or whether he or she lacks capacity to make decisions.

When there is disagreement about capacity a professional assessment should be sought from a clinical neuropsychologist or other trained health professional, such as a geriatrician or psychiatrist. For more information on capacity seek a copy of the Attorney Generals Department’s Capacity Toolkit by phoning 02 8688 7507 or www.lawlink.nsw.gov.au/diversityservices