

Additional General Information regarding Estate Planning, Power of Attorney, Enduring Power of Attorney and Enduring Guardianship

***This document provides additional information on
Estate Planning, Power of Attorney, Enduring Power of
Attorney and Enduring Guardianship***

Information Regarding Estate Planning

Estate Planning

I would like to highlight the following points regarding your estate planning position. *Please note* that before acting, you should seek the professional advice and services of your solicitor. _

A. **WILLS**

• **WHY SHOULD YOU HAVE A WILL?**

A will enables you to ensure that when you die your assets will be distributed according to your wishes. You can direct who is to take charge of your affairs on death (ie your executor) and see that your wishes are faithfully carried out.

• **WHAT HAPPENS IF YOU DIE WITHOUT A WILL?**

You will be deemed to have died "intestate". A court-appointed administrator will take control of your affairs and will distribute your estate according to the statutory formula under the laws of your State/Territory.

• **WHEN SHOULD YOU MAKE A WILL?**

Every person over the age of 18 and of sound mind has the legal capacity to make a will. It is sound practice for any person who is legally entitled to draw up a will to do so.

It should be made when you are in good health as you are then able to give it careful thought without stress or anxiety.

• **SHOULD YOU CHANGE YOUR WILL?**

You should review your will every few years or whenever your personal or financial circumstances change to the extent that the will does not reflect your current wishes.

Some of the changed circumstances where you should review your will include:

- Marriage, divorce of self
- Marriage, divorce, death of beneficiaries of the will
- Move residence to another State or Territory
- Executor is no longer alive or appropriate
- Substantial change in asset or debt position

• **WHAT IS A TESTAMENTARY TRUST AND HOW CAN YOU USE IT?**

A testamentary trust is a discretionary trust, which is usually established through part of a will and comes into operation on the death of the testator (ie will-maker). If a testamentary trust is used, on the testator's death certain nominated assets are transferred to the trust, by-passing the estate. The trustee(s) of the testamentary trust have the power to distribute income and capital of the trust in a flexible way to classes of, and particular, nominated beneficiaries. This can be useful for optimising tax and social security advantages for the remaining family of the testator.

B. POWERS OF ATTORNEY

- **WHAT IS A POWER OF ATTORNEY?**

Granting power of attorney means that you legally appoint a person or organisation to make decisions, sign documents and generally act on your behalf in various matters. The grantee of a power of attorney is usually someone you trust implicitly.

- **ARE THERE DIFFERENT TYPES?**

Yes. A LIMITED power of attorney allows the attorney to only undertake actions specified by you.

A GENERAL power of attorney gives very wide powers to the attorney to undertake actions on your behalf.

Both Limited and General powers of attorney are automatically revoked when the person granting the power of attorney becomes mentally incapable of handling their own affairs.

To overcome the problem of the power of attorney being revoked if you become mentally incapable, it may be possible to create an ENDURING power of attorney, which will continue to operate if you become mentally incapacitated.

C. ENDURING POWER OF ATTORNEY

The information in this pamphlet is to help you plan for the future management of your property and financial affairs. It is not legal advice.

What is an enduring power of attorney?

An enduring power of attorney is a legal document which you can use to appoint a person to make decisions about your property or financial affairs if you lose mental capacity. The person who makes an enduring power of attorney is known as 'the principal'. The person who you appoint to make decisions for you is known as 'the attorney'.

Why make an enduring power of attorney?

By making an enduring power of attorney, you are choosing who you want to manage your financial affairs if you lose the mental capacity to do this for yourself. If you do not have an enduring power of attorney and you lose mental capacity, there may be no one with legal authority to manage your financial affairs. This may mean that the Guardianship Tribunal or the Supreme Court will need to appoint a financial manager for you.

What is the difference between a 'general' power of attorney and an 'enduring' power of attorney?

A general power of attorney ceases to have effect after you lose the mental capacity to make financial decisions. An enduring power of attorney will continue even after you lose mental capacity (eg. if you develop dementia, have a stroke or sustain a brain injury in a car accident).

Can the attorney make any decisions apart from financial ones under an enduring power of attorney?

The attorney can make decisions about your property or financial affairs. This means that they can operate your bank accounts, pay your bills, and sell or buy property (such as your house or shares) on your behalf. An enduring power of attorney cannot be used to make medical or lifestyle decisions for you. However, you can appoint an enduring guardian to make these decisions. The Guardianship Tribunal can give you information about enduring guardianship.

Who can make an enduring power of attorney?

Anyone can make an enduring power of attorney if they have the mental capacity to understand the nature and effect of the power of attorney. People of any age (not just older people) can make an enduring power of attorney. It is a safeguard for anyone who would like to choose who can manage their financial affairs if they lose their mental capacity.

What level of capacity does someone need to make a valid enduring power of attorney?

To make a valid enduring power of attorney, the person making it must have mental capacity when they sign the document. At that time, the person must be capable of understanding the nature and effect of the enduring power of attorney. They must be capable of understanding the range of decisions which the attorney can make on their behalf. They should also understand that the attorney can make decisions without consulting them.

What if it is unclear whether a person has the mental capacity to make an enduring power of attorney?

If it is not clear if a person has the required mental capacity to make an enduring power of attorney, it is best to seek advice from a lawyer and health professionals. The lawyer may suggest that the person's capacity be assessed by a professional (such as a neuropsychologist or geriatrician) before the enduring power of attorney is made.

Who should I appoint as my attorney?

An attorney can have enormous power over your financial affairs. You should choose an attorney whom you trust and who will manage your finances in a responsible way. If your financial affairs are complicated, you should appoint an attorney who has the skills to deal with complex financial arrangements. You may wish to appoint a family member or a close friend as your attorney. You can also appoint the Public Trustee or a trustee company but fees will apply. You should contact these organisations for more information.

How many attorneys can I appoint?

You can appoint more than one attorney. When appointing more than one attorney, you should choose people who can cooperate with each other and who you trust to work together in your best interests. You can appoint your attorneys to act:

- jointly and severally (this means that the attorneys can make decisions together or separately),
- severally (this means that any one of the attorneys can make decisions independently of the other attorneys),
- jointly (the attorneys must agree on all decisions).

What if one of my attorneys dies or cannot continue for some reason?

Your power of attorney may be affected if one of your attorneys dies or cannot continue in their role. This depends on how you appointed the attorneys. If you appointed them to act jointly and one of them is no longer willing or able to carry out their duties, then this will automatically end the enduring power of attorney. However, if you appointed your attorneys to act jointly and severally or severally then the enduring power of attorney will continue, even when one of them can no longer act. The remaining attorneys can keep making decisions for you.

What powers can I give an attorney under an enduring power of attorney?

You can give your attorney the power to make any decision or do anything about your finances or property which you could do yourself. These broad powers include selling, buying or leasing property (such as your house), making investments, accessing cash (including bank accounts) and buying or selling shares. You can control the power you give to the attorney by placing limits or conditions in the enduring power of attorney. For example, you can give the attorney limited authority to do specific tasks, such as paying regular bills but not selling property. If you wish to limit your attorney's powers you should seek legal advice about the best way to do this.

What are the duties and responsibilities of an attorney?

An attorney is in an important position of trust. The attorney is legally responsible to you and must:

- always act only in your best interests;
- avoid doing anything as an attorney which would mean that their interests conflict with your interests;
- obey your instructions while you are mentally capable and any directions you make in the enduring power of attorney;
- act according to any limits or conditions placed on their authority;
- not give gifts or give themselves or others a benefit using your finances unless you specifically authorise this;
- keep their finances and money separate from yours;
- keep accurate and proper records of their dealings with your finances or property.

If your attorney abuses their position of trust, legal action can be taken to protect your interests.

When does an enduring power of attorney start?

You can choose when you would like your enduring power of attorney to start. You may want the enduring power of attorney to start immediately after you appoint the attorney or at some future date. When you make an enduring power of attorney, you should make it clear when you want it to start. If you do not make this clear, then the enduring power of attorney will start when the attorney accepts the appointment by signing the enduring power of attorney.

When does an enduring power of attorney end?

An enduring power of attorney ends:

- when you revoke it (so long as you have mental capacity at that time);
- on your death;
- when you have only appointed one attorney and that attorney dies or can no longer act as your attorney;
- when you have appointed two or more attorneys to act jointly and one of them dies or can no longer act as your attorney.

The enduring power of attorney may also end for more complex legal reasons such as bankruptcy. You should seek legal advice about these matters.

If your enduring power of attorney has ended and you no longer have the mental capacity to make a new one, the Guardianship Tribunal may be able to make orders so the enduring power of attorney can continue. For example, if your enduring power of attorney has ended because a jointly appointed attorney has died, the Tribunal has the power to reinstate the enduring power of attorney so that it can continue in your best interests.

How do I make an enduring power of attorney?

You can contact the Guardianship Tribunal (details at the back of this article) to obtain a form which you can use to make an enduring power of attorney. You must sign the form and have your signature witnessed. Your attorney(s) must sign the form before they can act as your attorney/s. If the form does not meet your needs you may wish to contact your legal adviser who can prepare a form for you.

Who can witness an enduring power of attorney?

An enduring power of attorney must include a witness's certificate completed and signed by an appropriate witness. The witness must be present when you sign your enduring power of attorney. The only witnesses who can witness your signature on an enduring power of attorney and complete the certificate are:

- an Australian solicitor or barrister
- a registrar of a NSW Local Court
- a licensed conveyancer or an employee of the Public Trustee/private trustee company who has completed an approved course
- a qualified overseas lawyer.

Your enduring power of attorney cannot be witnessed by someone who you are also appointing as your attorney (for example if you are appointing your solicitor as your attorney then he or she cannot also be your witness).

Do I need to register the enduring power of attorney?

If your attorney needs to use the enduring power of attorney to deal with any real estate you own in NSW, then, in most cases, the enduring power of attorney must be registered with Land and Property Services NSW. There is a fee charged for registering an enduring power of attorney. Even if there is no requirement to register the enduring power of attorney, you may choose to do so because that means the enduring power of attorney:

- will be on record as a public document;
- will be kept safe from loss or destruction;
- may be more easily accepted as evidence that your attorney has authority to deal with your property or financial affairs.

After registration, your original enduring power of attorney will be returned to you with a registration number stamped on it. Your attorney should use this number when signing any documents on your behalf.

If your enduring power of attorney is registered but you later revoke it, you should also register the revocation. Contact Customer Service at Land and Property Services NSW on (02) 9228 6666 or visit their website at www.lands.nsw.gov.au for more information about registration requirements.

How do I revoke my enduring power of attorney?

You can revoke your enduring power of attorney at any time so long as you have mental capacity to understand what you are doing when you revoke it. You should notify the attorney(s) that you have revoked the enduring power of attorney either by telling them or in writing.

It is clearer for everyone if you revoke the enduring power of attorney in writing, especially if it is registered at Land and Property Services NSW. If you do not tell the attorney about the revocation, the attorney can keep dealing with your finances and property. After revocation, you should destroy the original and any copies of the enduring power of attorney.

Can an interstate enduring power of attorney be used in NSW?

Yes.

If an enduring power of attorney was made in another Australian state or territory then it is automatically recognised in NSW. This does not apply to enduring powers of attorney which are made overseas.

Can a NSW enduring power of attorney be used interstate or overseas?

If you want your attorney to use your NSW enduring power of attorney in another state or overseas, you should make enquiries in that state or country. Every state and country has different laws about powers of attorney.

What is the Guardianship Tribunal's role in relation to enduring powers of attorney?

If there is a problem with how the enduring power of attorney is working, an application can be made to the Guardianship Tribunal or the Supreme Court for a review of the enduring power of attorney. The Guardianship Tribunal and the Supreme Court have the power to make a wide range of orders about enduring powers of attorney. For example, the Guardianship Tribunal could order the replacement of an appointed attorney if it was satisfied the attorney is not acting in the best interests of the person who appointed them.

You should seek legal advice if you are considering this and explore other options of resolving the problem. You can also contact the Guardianship Tribunal for information and brochures about reviews of enduring powers of attorney.

Where can I get legal assistance?

An enduring power of attorney is an important legal document. You should seek legal advice if you have any questions or concerns about enduring powers of attorney as this is a complex legal area.

- Community legal centres — some community legal centres will assist you for free or at low cost.
- Private solicitors — many private solicitors will prepare a power of attorney for a reasonable fee.
- The Public Trustee — the Public Trustee will prepare a power of attorney at no cost if they are appointed as the attorney.
- Registrar of a Local Court — a registrar of a Local Court can witness an enduring power of attorney. This service is free.

After the form is completed there is no requirement to formally lodge it anywhere unless the attorney needs to deal with land. To register with Land and Property Services NSW call (02) 9228 6666 or visit their website at www.lands.nsw.gov.au. However, it is a good idea to keep the completed appointment form in a safe place.

Tell someone else where it is.

Give a copy to your appointed attorney(s).

More Information

If you require additional information please contact:

The Guardianship Tribunal

Address: Level 3, 2a Rowntree Street, Balmain, NSW, 2041

Postal Address: Locked Bag 9, Balmain NSW 2041

Phone: (02) 9556 7600

Fax: (02) 9555 9049

Tollfree: 1800 463 928

Email: gt@gt.nsw.gov.au

Website: <http://www.gt.nsw.gov.au>

D. ENDURING GUARDIANSHIP

The information in this pamphlet is to help you plan ahead for personal or lifestyle decisions. It is not legal advice.

What is an enduring guardian?

An enduring guardian is someone you legally appoint to make personal or lifestyle decisions for you when you are not capable of doing this for yourself. You choose which decisions you want your enduring guardian to make. These are called functions. You can direct your enduring guardian on how to carry out the functions.

Why appoint an enduring guardian?

We all prefer to decide for ourselves where we live and what medical treatment and services we have. Unfortunately this is not always possible. Every day people are involved in accidents or become sick. Sometimes this can lead to them being unable to make decisions for themselves.

By appointing an enduring guardian you choose who you want to make decisions for you if you lose the capacity to do this for yourself.

Who can appoint an enduring guardian?

If you are over 18 years, you can appoint one or more people to be your enduring guardian(s). At the time you appoint an enduring guardian, you must have the mental capacity to understand what you are doing.

Who can be an enduring guardian?

The person you appoint as your enduring guardian must be:

- at least 18 years old
- someone you trust to make decisions in your best interests.

The enduring guardian cannot be a person who, at the time of appointment:

- provides medical treatment or care to you on a professional basis; or
- provides accommodation services or support services for daily living on a professional basis; or
- is a relative of one of the above.

How many enduring guardians can I appoint?

You can appoint more than one enduring guardian. When appointing more than one enduring guardian, you should choose people who can cooperate with each other and who you trust to work together in your best interests. It is also important to consider their availability to make decisions on your behalf.

You can appoint your enduring guardians to act:

- jointly and severally (this means that the enduring guardians can make decisions together or separately),
- severally (this means that any one of the enduring guardians can make decisions independently of the other enduring guardian),
- or jointly (the enduring guardians must agree on all decisions).

What if one of my enduring guardians dies or cannot continue for some reason?

Your appointment of enduring guardians may be affected if one of your enduring guardians dies or cannot continue in their role. This depends on how you appointed the enduring guardians. If you appointed them to act jointly and one of them is no longer willing or able to carry out their duties, then this will automatically end the appointment of enduring guardians. If you do not want this to happen, you will need to make it clear in the appointment form that the remaining guardians can keep making decisions for you even if one of the original guardians dies, resigns or becomes incapacitated.

However, if you appointed your enduring guardians to act jointly and severally or severally then the appointment of the enduring guardians will continue, even when one of them can no longer act. The remaining enduring guardians can keep making decisions for you.

What happens if I only have one enduring guardian and they cannot continue?

If the person you have appointed dies, resigns or becomes incapacitated, you can appoint someone else to be your enduring guardian. If you do not have the mental competence to do this, the Guardianship Tribunal can, in limited circumstances, order another person to be appointed as your enduring guardian. Someone will need to lodge an application on your behalf.

What is an alternative enduring guardian?

You can appoint an alternative enduring guardian who can act only if the original enduring guardian/s dies, resigns or becomes incapacitated.

What principles guide an enduring guardian?

Your enduring guardian must act within the principles of the *Guardianship Act 1987*, in your best interests and within the law. You cannot give your enduring guardian a function or a direction which would involve them in an unlawful act.

What kind of decisions can an enduring guardian make?

You can give your enduring guardian as many or as few functions as you like. The appointment form has a list of functions and you can delete the functions you do not want your enduring guardian to have and add others if you wish. For example, you can give them the power to decide about your health care but not where you live.

You may give the enduring guardian directions about how to exercise the decision making functions you give them. For example, you can direct your enduring guardian to consult with a particular close friend before making a decision. If your enduring guardian has a health care function, they will be able to access your medical records to help make decisions for you.

What decisions can't an enduring guardian make?

An enduring guardian cannot consent to anything unlawful and cannot:

- make a will for you,
- vote on your behalf,
- consent to marriage,
- manage your finances, or
- override your objections, if any, to medical treatment.

An application must be made to the Guardianship Tribunal to authorise medical treatment overriding your objections. Only the Tribunal can consent to certain 'special' medical treatments.

If you strongly object to the enduring guardian's decisions, you or someone on your behalf can ask the Guardianship Tribunal to review the enduring guardianship appointment.

When does an enduring guardianship appointment start?

The appointment of your enduring guardian takes effect only if you become unable to make your own personal or lifestyle decisions. Your enduring guardian may wish to seek the opinion of a medical practitioner about your capacity to make decisions before acting on your behalf.

When does an enduring guardianship appointment end?

An enduring guardianship appointment ends:

- when you die
- if you revoke the appointment
- if you marry after appointing an enduring guardian. On marriage the appointment is automatically revoked or cancelled. If you wish to reappoint the enduring guardian, you need to complete a new form reappointing the person.
- if one of the guardians dies, resigns or becomes incapacitated and they were appointed jointly unless you provide otherwise in the form.
- if the Guardianship Tribunal revokes the appointment of enduring guardian. If the Tribunal makes a guardianship order that will suspend any appointment of an enduring guardian.

How do I appoint an enduring guardian?

STEP 1

You need to discuss the appointment with your chosen enduring guardian and make sure they are willing to take on this responsibility if you were no longer capable of making decisions for yourself. You should discuss the functions in detail and ensure that your guardian clearly understands your wishes.

STEP 2

You may also wish to discuss the appointment with family or other significant people in your life.

STEP 3

You can contact the Guardianship Tribunal (details at the back of this article) to obtain a form to appoint one enduring guardian or more than one if you want your enduring guardians to have the same functions. However, if you want your enduring guardians to have different functions and to act separately, you should fill out a separate form for each proposed enduring guardian.

STEP 4

Make sure the form is signed by:

- you or an eligible signer on your behalf
and
- the enduring guardian(s)
and
- the witness for each signature.

Who can be an eligible signer or witness?

If you are competent to make an enduring guardianship appointment but you are not physically able to sign the form, an eligible signer can sign for you. An eligible signer must be over 18 and cannot be the enduring guardian or a witness. You must be present when the eligible signer signs on your behalf.

A witness must be a NSW barrister or solicitor with a practising certificate, a registrar of the Local Court, or an interstate legal practitioner. Every signature on the form must be witnessed. The different signatures can be witnessed by different people at different times and places. For example, your signature can be witnessed in NSW and the enduring guardian's signature can be witnessed in another state or territory by a different witness.

What should I do with the appointment?

It is a good idea to keep the appointment form in a safe place. Tell someone else where it is. Give a copy to your enduring guardian. You may wish to give copies to significant people in your life (eg your doctor). You **do not** have to send the enduring guardianship form to the Guardianship Tribunal.

How do I revoke my enduring guardianship appointment?

While you are capable of making your own decisions, you can revoke the appointment of an enduring guardian. To do this you need to complete a *Revocation of Appointment of Enduring Guardian* form available from the Guardianship Tribunal or a solicitor. This form will also need to be witnessed by an eligible witness. You have to advise the enduring guardian in writing that their appointment has been revoked.

You can appoint a new person as your enduring guardian, or change the functions or directions given to your enduring guardian. You will need to complete a new form of appointment to achieve any of these things.

Only the Guardianship Tribunal can make changes to the appointment if you have lost the capacity to do this for yourself.

Can an interstate enduring guardianship appointment be used in NSW?

Yes.

If an enduring guardianship appointment was made in another Australian state or territory then it is automatically recognised in NSW. This does not apply to enduring guardianship appointments which are made overseas.

Can a NSW enduring guardianship appointment be used interstate or overseas?

If you want your enduring guardianship appointment to be used in another state or overseas, you should make enquiries in that state or country. Every state and country has different laws about enduring guardianship.

What if someone is worried about what my enduring guardian is doing?

Anyone with a genuine concern for your welfare can apply to the Guardianship Tribunal for a review of the appointment if they feel that your enduring guardian is not making appropriate decisions on your behalf. The Tribunal can revoke the appointment or confirm it. It may also change the functions in the appointment or make a guardianship order.

The Tribunal does not supervise enduring guardians. It will act only if it receives an application from a concerned person and receives information which leads it to review the enduring guardian appointment.

Where can I get legal assistance?

- Community legal centres – some will assist you for free or at a low cost.
- Private solicitors – can draw up forms for the appointment of an enduring guardian. Private solicitors charge for their services.
- Registrar of the Local Court – can witness the appointment of an enduring guardian for free.

After the form is completed there is no requirement to formally lodge it anywhere. However, it is a good idea to keep the completed appointment form in a safe place.

Tell someone else where it is. Give a copy to your appointed enduring guardian(s).

More Information

If you require additional information please contact:

The Guardianship Tribunal

Address: Level 3, 2a Rowntree Street, Balmain, NSW, 2041

Postal Address: Locked Bag 9, Balmain NSW 2041

Phone: (02) 9556 7600

Fax: (02) 9555 9049

Tollfree: 1800 463 928

Email: gt@gt.nsw.gov.au

Website: <http://www.gt.nsw.gov.au>

E. WHO TO CONSULT

In order to implement our strategies in these areas we recommend you consult an appropriately qualified person or organisation such as a solicitor or a trustee corporation because the laws relating to wills and powers of attorney are very complex and vary between states/territories. The function of the solicitor is to draft the relevant documentation and to provide more detailed and technical advice on implementation so that it is tailored to your particular circumstances.

Please supply us with the name and contact details of the person(s) you have nominated to perform the legal services so that we may co-operate with them to implement these aspects of your financial plan.

Disclaimer and Warning

The information above is of a general nature only. It should not be used as a source to make financial decisions. It's also important to note that the legislation and figures related to this topic tend to change regularly and therefore the information above may not reflect the current status. We recommend that if you are looking for advice on this matter, you should contact [us](#).