

Policy: Enduring Guardianship – Witnessing by NSW Trustee and Guardian

Purpose

This policy sets out the circumstances in which NSW Trustee and Guardian staff will act as a witness to the execution of an Enduring Guardianship appointment. It identifies the issues which must be addressed to ensure that the document has been validly witnessed.

Policy statement

Enduring Guardianship appointments enable a competent adult to appoint a guardian, to make personal, health and lifestyle (not financial) decisions for them in the event of future loss of capacity.

The [Guardianship Regulation 2016](#) extends the class of persons eligible to be prescribed witnesses to include a person:

- i. who is a member of staff of the NSW Trustee and Guardian, and
- ii. who has completed an approved course of study, and
- iii. have been approved by the Chief Executive Officer of NSW Trustee and Guardian

1.1 Enduring Guardianship Service

For the current fee to draft an Appointment of Enduring Guardian with NSW Trustee and Guardian please refer to the [Enduring Guardianship fees](#) published on the NSW Trustee and Guardian website.

- NSW Trustee and Guardian prepares and witnesses Enduring Guardianship documents for all members of the public who are 18 years and over and who have capacity to make an Enduring Guardianship appointment.
- NSW Trustee and Guardian will witness the acceptance of an Enduring Guardianship document by the appointee in circumstances where NSW Trustee and Guardian prepared and witnessed the Enduring Guardianship document for the appointor.
- NSW Trustee and Guardian **does not** witness documents drafted externally.
- NSW Trustee and Guardian will arrange and pay for a translator, when required.
- NSW Trustee and Guardian does not assist with the drafting of medical and other directives, except by certain pro forma examples of acceptable directions that may be included when NSW Trustee and Guardian is drafting Enduring Guardianship documents.
- NSW Trustee and Guardian does not assist with the preparation of Advance Care Directives or Plans. The NSW Ministry of Health guide "[Making an Advanced Care Directive](#)" and further information is available at the [NSW Health website](#).

A customer may commence providing instructions to NSW Trustee and Guardian for their Enduring Guardianship via the Planning Ahead Portal they can provide all of the instructions at an appointment with NSW Trustee & Guardian.

1.2 Who can be appointed as an enduring guardian?

The Enduring Guardian may be a family member or friend who is 18 years of age or over. NSW Trustee and Guardian and Public Guardian are not able to be appointed.

There are certain people who cannot be appointed as an enduring guardian. They are:

- a.** A person who is responsible for, or involved in, providing medical services, accommodation, or other services to support or care for the appointor on a paid basis
- b.** anyone who is the spouse, parent, child, brother, or sister of a person of the kind referred to in **a.** above.

However, if the appointed Enduring Guardian later becomes responsible for the provision for fee or reward of a service to the appointor the appointment does not lapse.

A person receiving a carer payment or allowance from Centrelink (or equivalent from Department of Veterans' Affairs) can be appointed.

1.3 Terminating the Enduring Guardianship

The Enduring Guardianship ends when the appointor dies and, depending on the circumstances, when the appointor marries. It may also end when:

- the appointor revokes it; or
- the appointee resigns

1.3.1 Revocation

Revocation of the Enduring Guardianship by the appointor must be in the prescribed form - Revocation of Appointment of Enduring Guardian. As with execution of the Enduring Guardianship appointment, it requires that the appointor has the capacity to understand the nature of the decision they are making. If the appointor does not have capacity, they are unable to revoke the Enduring Guardianship.

The revocation will not be effective until written notice is given to the appointee. It is the responsibility of the appointor to provide written notice of the revocation to the appointee. It is recommended the revocation be sent to the guardian via registered post with a requirement that they sign upon collection so there is evidence of receipt.

Further information is available in the [Revocation of Will / Power of Attorney / Appointment of Enduring Guardian Policy](#).

1.3.2 Resignation

The appointee can resign by giving notice in the prescribed form - Notice of Resignation as Enduring Guardian. As with execution of the Enduring Guardianship appointment, it requires that the appointee has the capacity to understand the nature of the decision they are making.

The appointee can only resign if the appointor has capacity. If the appointor has lost decision-making capacity, the Enduring Guardian can only resign with the approval of the Guardianship Division NCAT.

The resignation will not take effect until the appointor has been notified in writing and it is the responsibility of the appointee to attend to this requirement. It is recommended the resignation be sent to the appointor via registered post with a requirement that they sign upon collection so there is evidence of receipt.

Scope

This policy applies to all employees of NSW Trustee and Guardian in relation to the preparation and witnessing of Enduring Guardianship appointments. Enduring Guardianship appointments are **only** to be witnessed by:

- NSW Trustee and Guardian Solicitors; or
- approved staff who have successfully completed the Enduring Guardianship course of study, when acting in the course of their employment. No witnessing of documents in a private capacity outside the course of employment is authorised.

Legislative context

- [Guardianship Act 1987](#)
- [Guardianship Regulation 2016](#)

Related resources

- [Enduring Guardianship Handbook](#)
- [Enduring Guardianship Fact Sheet Translated Resources](#) (translated in community languages)
- [When a client's mental capacity is in doubt – a practical guide for solicitors. Law Society NSW 2016 publication](#)
- Revocation of Appointment of Enduring Guardian
- Notice of Resignation as Enduring Guardian

Definitions

Appointor	means the person who is making the Enduring Guardianship appointment
Appointee	means the person(s) who is being appointed to be the Enduring Guardian
Approved Employees	means employees of NSW Trustee and Guardian or Public Guardian who have successfully completed an approved course of study and been authorised to perform this role by the Chief Executive officer of NSW Trustee and Guardian
Medical Directive	is used to refer to any direction concerning medical treatment
the Act	means the Guardianship Act 1987
the Regulations	means the Guardianship Regulation 2016
Witness	means a NSW Trustee and Guardian Solicitor who holds a current legal practising certificate or an approved NSW Trustee and Guardian employee who has successfully completed the Enduring Guardianship course of study acting in the course of their employment.

Document information

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