



Advice for Enduring Guardians

Information for enduring guardians appointed under an enduring power of guardianship

What is an enduring power of enduring guardianship?

It is a legal document in which someone (the appointer) designates an individual (the enduring guardian) with the power to make lifestyle decisions on their behalf. These decisions may include:

- access to services
- where to live
- health care
- who has contact with the appointer.

Enduring means the power continues (endures) when the appointer loses the capacity to make decisions.

What is capacity?

To have capacity is to have the ability to reason things out, that is to:

- understand
- retain
- believe
- evaluate (i.e. process), and
- weigh relevant information.

A person lacks capacity to make decisions related to their lifestyle if they are unable to adequately determine their own needs, and what they require to have a reasonable quality of life appropriate to their circumstances.

When does the enduring guardian's powers begin?

The enduring guardian's powers only begin when the appointer has lost capacity.

An enduring guardian may seek advice from the donor's doctor if they are unsure whether the appointer has lost capacity. In some instances, the doctor may be unable to advise the enduring guardian, or may think a specialist report is required. The enduring guardian may then have to ask the appointer to see a relevant specialist such as a geriatrician, psychiatrist or neuropsychologist.

The appointer may need to sign a consent form to allow the enduring guardian to discuss health information with their doctor. A sample consent form is available at www.publicadvocate.vic.gov.au, or call OPA's Advice Service on 1300 309 337 for assistance.

Obtaining a specialist's report may be expensive, so the enduring guardian may have to consider how this will be paid for, either by the appointer or by the person looking after the appointer's money. This may be a financial attorney or an administrator. Alternately, it may be possible to obtain an assessment and specialist's report through the public health system.

If the appointer refuses to let the enduring guardian talk to their doctor or obtain a specialist's report as required, the enduring guardian can seek advice from the Victorian Civil and Administrative Tribunal (VCAT).

What are the enduring guardian's powers?

The enduring guardian's powers are set out in the document appointing them. The usual powers are:

- to decide where the appointer is to live, whether permanently or temporarily
- to decide who the appointer is to live with
- to decide whether the appointer should be permitted to work
- to consent to any health care that is in the appointer's best interests
- to restrict visitors to such extent as may be necessary in the appointer's best interests.

The enduring guardian needs to check the document appointing them to be sure of exactly what their powers are. The appointer can set specific limitations on the enduring guardian's powers in the document.

The appointer may have set out in the document any wishes they want the enduring guardian to take into account when making decisions for them. These wishes should always be considered and implemented wherever possible.

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The Victorian Civil and Administrative Tribunal Guardianship List

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Tel: (03) 9628 9911 Fax: (03) 9628 9932
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www.vcat.vic.gov.au



What does the law require of an enduring guardian?

The law requires that the enduring guardian:

- act in the appointer's best interests
- take into account the appointer's wishes and give effect to these wherever possible
- encourage the appointer to participate in the life of the community
- protect the appointer from abuse, neglect or exploitation
- advocate for the appointer
- act reasonably and in good faith.

If the enduring guardian has any conflict of interest or concern, they can ask VCAT for advice.

Can the enduring guardian make decisions that cost money?

There will usually be financial implications of the decisions an enduring guardian makes. They need to ensure that the appointer can afford those decisions. If there is a financial attorney or an administrator appointed, the enduring guardian should discuss their decisions with them to see if the appointer can afford them.

Health and medical decisions

The enduring guardian may be appointed to make decisions about health care for the appointer. It is important to note that health care is a broad term, and is not just about medical and dental treatment.

Medical and dental treatment decisions are made by the 'person responsible' for the appointer under the *Guardianship and Administration Act 1986*. Consult OPA's fact sheet *Medical/Dental Treatment for Patients who Cannot Consent* to determine who is the 'person responsible', as it may be the enduring guardian.

A person responsible, including an enduring guardian, cannot refuse medical treatment for the appointer. Only an agent appointed under the *Medical Treatment Act 1988* or a guardian appointed by VCAT can refuse treatment.

The person responsible can advocate for treatment of the appointer. However, a health service cannot be compelled to provide health care where the service has a reasonable belief that treatment is futile or would be unduly burdensome.

The enduring guardian is responsible for consenting to health care that is not medical and dental treatment, including:

- physiotherapy
- mobility exercises
- alternative therapies
- special diets.

The enduring guardian may withhold consent if they do not agree with the proposed health care. If a doctor disagrees with the decision to withhold consent to medical treatment, they may serve the enduring guardian with a notice, and you may take the matter to VCAT for a decision regarding what care the person should receive.

How can the enduring power of guardianship document be used?

Enduring guardians may need to deal with a number of people and organisations when making decisions for the appointer. They are entitled to see the form of appointment, and check that the enduring guardian is acting within their powers.

As the enduring guardian's powers only come into effect when the appointer has lost capacity, the party they deal with is entitled to seek proof that the appointer has lost capacity (see the previous section *When do my powers begin?*)

Can someone ignore the enduring guardian's decision?

Another person is not entitled to ignore the enduring guardian's authority, as stated by the document, unless they have good reason.

If the person is an organisation, the enduring guardian may need to pursue their refusal by using the organisation's grievance procedure.

If this happens, the enduring guardian may also seek advice from VCAT. VCAT may provide a declaration of the enduring guardian's authority, which may assist others to recognise their authority.



What records should the enduring guardian keep?

The enduring guardian should keep a record of any decisions they make, and the reasons why they chose to make them. It may be helpful for the enduring guardian to keep copies of correspondence, as well as a record of conversations they have with service providers regarding the appointer.

These records may prove useful in a dispute with a service provider, or if someone challenges that the decisions were made in the appointer's best interests.

What if the enduring guardian makes a mistake?

If the enduring guardian acts in good faith but makes an honest and reasonable mistake, they will not be personally liable. If the mistake is serious, the attorney should seek advice from VCAT.

If the enduring guardian acted dishonestly, in bad faith or unreasonably, VCAT is likely to revoke their authority. If the enduring guardian has contravened the Guardianship and Administration Act, they may be charged with an offence. If they have acted in breach of their duty of care to the donor, they may also be responsible for damages in a civil court.

How does an enduring power of guardianship end?

An enduring power of guardianship ends if:

- the appointer revokes the power (while competent to do so)
- the appointer later appoints another enduring guardian or alternative enduring guardian
- VCAT revokes the power
- the appointer dies
- the enduring guardian dies (where there is no alternative guardian)
- the enduring guardian and alternative guardian die.

Can the enduring guardian resign?

If the enduring guardian no longer wishes to accept the appointment they should communicate this to the appointer; then the appointer can make other arrangements if they wish. If the donor is no longer competent to revoke the enduring power of guardianship then the enduring guardian should consider applying to VCAT to have the appointment revoked. If an enduring guardian resigns it would not mean that the alternative enduring guardian would be able to act.

When can an enduring guardian act?

The alternative enduring guardian may only act if the enduring guardian:

- dies,
- is absent, or
- becomes incapacitated.

Unless these things occur, the enduring guardian's resignation would bring the power to an end. If the appointer needed a guardian after their resignation, an application would have to be made to VCAT.

What is the role of VCAT?

VCAT can provide advice for enduring guardians. They must ensure they do not wilfully conceal or misrepresent facts to VCAT.

If a person considers that the enduring guardian is not exercising their powers in the best interests of the appointer, they may seek VCAT's intervention. VCAT may suspend their power, vary the terms of the appointment, or revoke the power.

Does VCAT charge a fee?

No, VCAT does not charge a fee. However, if the enduring guardian wants to be represented by a lawyer, they need to establish if this is a cost they pay personally, or if it is a reasonable expense of the appointer's estate. VCAT may be able to provide advice regarding this.



The Office of the Public Advocate is an independent body established by the Victorian State Government. It works to promote the interests, human rights and dignity of Victorians with a disability. It provides information, advice, education and assistance with advocacy, guardianship, powers of attorney, and consent to medical and dental treatment.

The Office of the Public Advocate supports three voluntary programs, the Community Visitors Program, the Independent Third Persons Program, and the Community Guardianship Program. Community Visitors monitor the quality of disability services in order to safeguard the rights of vulnerable people. Independent Third Persons provide support for people with a cognitive disability or mental illness who have contact with the police. Community Guardians are volunteers appointed as guardians for Victorians with a cognitive disability who can't make decisions for themselves.

For more information visit:
www.publicadvocate.vic.gov.au
or call our Advice Service on
1300 309 337 (local call cost).