

GUARDIANSHIP

Legal and Insurance Forum
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Presented by:

Dr Tim Smyth

Special Counsel

tim.smyth@holmanwebb.com.au

3899662

HOLMANWEBB
LAWYERS

Might be trite, but still true!

**“Prevention is better than cure”,
but
a pretty flexible cure is available!**

Why bother?

- **Probability of not being able to make decisions yourself is increasing:**
 - we are living longer
 - prevalence of dementia
 - finance and asset management more complex
 - younger people with developmental disability living longer and with more independent living options
 - “traditional” family support structures changing
- **May reduce disputes**
- **Catalyst for planning your “future”**
- **Greater certainty for service providers**

Keeping it simple

- **If no major assets – appointing a person as your agent for banking, Centrelink, Medicare and tax might be enough**
 - but what if they die or lose capacity?
- **Reforms to Powers of Attorney and Guardianship legislation now make it easier and more flexible**

What is the problem?

□ Does the issue concern

- consent to medical or dental treatment?
- personal care or lifestyle?
- finances or property and other assets?

□ The person

- has lost all decision making capability?
- can't make decision on the issue?
- is not available to make decision or undertake the action needed?

Capacity

- ❑ No definition – a legal and a medical concept
- ❑ You must have “capacity” at the time you appoint an attorney and/or enduring guardian
- ❑ Very much depends on the context and the issue
- ❑ May be temporary loss of capacity

Capacity doubts

- If in doubt, best to get written clinical opinion – GP, psychologist, geriatrician
- If a dispute, best to make an application to the Tribunal*

*Guardianship Division of the New South Wales Civil and Administrative Tribunal (NCAT)

Key terms*

- “person responsible”
- Power of attorney
- Enduring power of attorney
- Enduring guardian
- Legal guardian
- Financial manager

* For convenience, references are to legislation in NSW. The framework in other States and Territories is similar but not exactly the same.

“Mix and match”?

- Remember, **attorneys** cannot make medical and lifestyle decisions and **guardians** cannot make financial and property decisions
- May be different people, but same person can have multiple roles – attorney, guardian and/or financial manager

Use the forms under the Acts

- **To appoint an attorney and grant an enduring power of attorney**
 - Use the forms under the *Powers of Attorney Regulation 2011 (NSW)*
 - Very good Fact Sheet *Powers of Attorney in New South Wales (March 2014)* on LPI website – www.lpi.nsw.gov.au

Form for enduring guardian

- **Guides and form available from NCAT, Office of Public Guardian websites**
 - *Planning ahead – a guide to enduring guardianship (January 2014) at www.ncat.nsw.gov.au*
 - *Enduring guardianship in NSW (March 2014) at www.planningaheadtools.com.au*
 - See Enduring Guardianship information on the NSW Trustee and Guardian website www.tag.nsw.gov.au

Children different regime

- ❑ Guardianship legislation covers persons aged 16 and older
- ❑ You must be aged 18 and above to appoint an attorney or enduring guardian
- ❑ Supreme Court retains jurisdiction with children if no parent
- ❑ Family Court may also have a role
- ❑ Child protection legislation may cover issue

Person responsible

- Under guardianship legislation a ‘person responsible’ may make some decisions in relation to consent to medical or dental treatment
- Descending hierarchy – spouse*, unpaid carer or a relative/friend with ‘close personal relationship

* includes de facto and/or same sex spouse

General power of attorney

- Appoints a person or legal entity (*attorney*) to do things on your (*principal*) behalf
- Legal and financial matters, not personal care, medical or lifestyle decisions
- Ends when revoked or principal loses capacity
- Principal can still act

General power of attorney

- Attorney must be 18 or older
- Very flexible, limited time and/or purposes
- Can have more than one and/or substitutes
- Must be registered with LPI if attorney is to deal with real estate for principal

Enduring power of attorney

- Continues to operate when principal loses capacity
- Attorney must sign and agree and principal's signature appointing attorney must be witnessed by prescribed person

Guardian

- Appointment by the Tribunal* (or Supreme Court)
- Differs from power of attorney as guardian is legally authorised to make personal and/or lifestyle decisions for person
- Can have financial powers if also appointed as attorney or Financial Manager

* Guardianship Division of the New South Wales Civil and Administrative Tribunal (NCAT)

Guardian

- **Guardianship orders by Tribunal can be very flexible and for a limited time or for a limited purpose**
 - Guardian does not have to be Public Guardian, but Tribunal needs to be satisfied that suggested person is suitable, willing and has no conflicts
 - Functions may include approval of ‘restrictive practices’

Restrictive practices

- Not defined in the *Guardianship Act 1987* (NSW) but concerns limiting person's freedom of movement or access to places or objects
 - generally where challenging behaviour is an issue

Enduring guardian

- Appointed to make personal and/or lifestyle decisions for the principal when principal no longer able to do so
- Can't make financial or property decisions
- While appointment must be made while principal has capacity, enduring guardian cannot act until principal has lost capacity

Enduring guardian

- Very flexible, can appoint more than one and can appoint substitutes
- Functions can be wide or narrow
- Appointment ends if enduring guardian resigns, dies or loses capacity OR principal marries*
- Tribunal can review and vary, confirm or revoke appointment

* unless marriage is to the enduring guardian

Financial Managers

- **Appointed under a Financial Management Order by the Tribunal - orders can be very flexible**
 - Tribunal must first decide whether an order is necessary and if so, then who should be appointed as the Financial Manager
 - NSW Trustee will supervise the Financial Manager
 - If no suitable person, then the NSW Trustee will be appointed.
 - Fees and charges will apply for NSW Trustee roles

Resolving concerns or disputes....

- If unable to be resolved directly, then paths vary according to nature of appointment
- If person has capacity, they can revoke the appointment
- An attorney cannot revoke appointment of other attorneys or guardians by the principal

Resolving concerns or disputes

- **Supreme Court can review them all, but expensive**
 - Powers of attorney disputes go to Supreme Court
- **All others (including enduring powers of attorney) can go to Tribunal – low cost and flexible**
- **Remember Tribunal can always appoint a guardian and/or financial manager**
 - this will suspend operation of a power of attorney and/or enduring guardian, depending on scope of Tribunal's orders.

How does Tribunal work?

- **Guardianship Division of NCAT**
 - Very helpful website
 - Informal, low cost
 - Hearings can be by telephone
 - Anyone with a legitimate interest can make an application for appointment or review of an existing appointment (other than power of attorney)

- **Tribunal will only make orders when they are actually needed**

Tribunal orders

- A Tribunal order appointing a guardian and/or a Financial Manager will suspend an existing appointment of an attorney or enduring guardian to the extent of the functions granted under the Tribunal order

Practical issues

- **Choose carefully**
 - people you trust
 - will they be around when needed?
 - alternates?

- **What functions do you want them to have?**

- **When do you want their powers to start?**

- **Who have you told and where do they find the document?**