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DO YOU HAVE APPOINTMENT OF ENDURING GUARDIAN?

IMPORTANT INFORMATION FOR YOU

We regularly come across people who do not know about or do not have Appointment of Enduring Guardian document.

Some people learn about it when they or their family member visits a doctor's practice or is admitted to a hospital with a serious illness where they are asked if they made this document.

Other people often mistakenly think that it is actually a power of attorney or is already included in it. In New South Wales, a Power of Attorney and an Appointment of Enduring Guardian are two separate documents.

We address below some questions people ask us about Appointment of Enduring Guardian:

1. ***“What is an Appointment of Enduring Guardian?”*** It is an important legal document. By this document you appoint your enduring guardian to make *on your behalf* health and medical treatment decisions, care and accommodation decisions and other lifestyle decisions.

Such decisions can be made for you ***only if and when you need an enduring guardian: when you are physically and/or mentally ill or frail (temporarily or permanently) to the extent that you are not capable to manage yourself and make decisions for your care, medical or dental treatment, lifestyle and/or accommodation.*** Some examples of such situations are when a person suffers a serious injury in a car accident or has a surgery and is unreachable by any communication; or has a sudden serious or terminal illness affecting him/her in such way that the person no longer can make decisions and manage him/herself.

2. ***“Who can I appoint as my enduring guardian?”*** Usually it is a spouse, adult child, close relative or friend. It is important that person who you appoint is trustworthy. And is the person who you know well and trust, and who knows you and your needs and values well and is capable to make such sensitive decisions on your behalf.

Enduring Guardian also must have sufficient mental capacity.

3. ***“Can I appoint more than one enduring guardian?”*** Yes. You can appoint them jointly, jointly and severally, or severally.

Jointly means your guardians always have to make decision together. So, they are only able to make decisions if they all agree about the decision.

Jointly and severally means they can make decisions together or separately. And severally means separately.

4. ***“Do I need to appoint alternative enduring guardian or guardians?”*** It is very common, especially if you appoint only one primary enduring guardian and he/she is same age as you or older.

Alternative enduring guardian will only have authority to act if the primary enduring guardian(s) die, resign or become incapacitated (including losing mental capacity) so he/she can no longer be your guardian.

5. ***“Can I appoint enduring guardian(s) without asking them?”*** Not really. Because of important decisions your enduring guardians may need to make, it is essential you ask them first. And your enduring guardian(s) must sign their acceptance of the appointment for it to be effective.

6. ***“When does Appointment of Enduring Guardian stop?”*** It operates while you are alive and only if and when it is needed (see number 1 above) and will stop when you pass away.

You can revoke (terminate) Appointment of Enduring Guardian at any time provided you have mental capacity at that time. There is a specific revocation form to be completed with a lawyer.

Your enduring guardian can resign, by giving you notice in writing.

7. ***“What happens with Appointment of Enduring Guardian if I marry?”*** Your appointment of a person as your enduring guardian will be automatically revoked unless such person is your new spouse.

You should re-consider your Appointment of Enduring Guardian if you (or are about to) separate, divorce, enter a new relationship or marry.

8. ***“Do I need to make Appointment of Enduring Guardian?”***

It is vital that persons of mature age before they become very old and frail, or persons who have serious or chronic illness or of weak health make proper Appointment of Enduring Guardian. **You can only make Appointment while you have mental capacity.**

If you are young and healthy but have an active lifestyle or are involved in active sports or potentially physically dangerous activities, trade or profession, you should consider making Appointment.

And we generally recommend Appointment of Enduring Guardian to all persons as accidents and sudden unexpected events, illnesses and emergencies can happen to anyone at any time.

9. ***“What happens if I cannot manage and make decisions myself any longer or suddenly, for example because of an accident, and do not have Appointment of Enduring Guardian?”***

If a time comes when you no longer have sufficient mental capacity or otherwise become incapable, your family will need to go to the tribunal or Court to have a guardianship order made for you. This will cost you and your family monies in legal fees and time and will be stressful. And a guardian appointed for you may not necessarily be a person who you would have appointed yourself.

10. ***“Is Appointment of Enduring Guardian same as advance (health) care directive?”***
Not really, although they are similar documents. It also depends on the Australian state in which they are made.

Appointment of Enduring Guardian is usually a document of wider application as it can deal with accommodation and other lifestyle (and not only medical treatment) decisions.

Advance care directive tends to be more used for particular circumstances (for a certain illness) and in a particular setting (before going to a hospital for treatment or management of that illness).

Please contact us if you are thinking to make an advance care directive, especially if you also have or are thinking to make Appointment of Enduring Guardian. It may be that you do not really need an advance care directive if you have a proper Appointment of Enduring Guardian made.

11. ***“What about enduring power of attorney?”*** Your enduring guardian can only make medical treatment and other lifestyle decisions. You should make Enduring Power of Attorney if you want same or other person(s) to make financial decisions on your behalf if you lose capacity. ***Please read our Guide “Do You Have Power of Attorney Suitable for You?”***, published on our website and contact us if you wish such document to be prepared.

WE CAN ASSIST YOU WITH APPOINTMENT OF ENDURING GUARDIAN

Having a proper Appointment of Enduring Guardian prepared by an experienced lawyer is always recommended. *Do not use Do It Yourself kits and internet resources* and avoid using forms given to you by a medical practitioner for “urgent” completion *for your Appointment of Enduring Guardian* or advance care directive. They are not simple forms to be filled in; they can have far reaching legal, personal and medical consequences for you and your family if not prepared by or with an experienced lawyer.

We, at Boyarkina Lawyers will be happy to assist you with Appointment of Enduring Guardian and any other aspect of enduring guardianship.

We can also assist with your power of attorney, estate planning and prepare a Will suitable for you, your assets and circumstances. Wills and estate planning is a complex area of law with many unknowns and pitfalls which are not obvious to ordinary people.

Please refer our Guide “Do You Have a Good Will?”, published on our website and contact us if you wish your Will to be prepared or amended.

We adopt a personal individual and detailed approach to you and your proposed documents. We uphold our values of integrity, care, honesty, ethics, experience and clients’ trust in what we do.

Natalya Boyarkina helped many clients over the past 15 years and look forward to hearing from you. Why not pick up the phone and call 0431 925 047 for a private chat, or email Natalya on natalya@boyarkinalawyers.com.au

If you know persons who will be interested in the above information, please feel free to send this Guide to them.

If you wish to receive our guides and newsletters in future, please feel free to provide your email address to us.

BOYARKINA LAWYERS



Natalya Boyarkina has been in practice as a Commercial, Property, Leases, Conveyancing and Wills & Estates lawyer in Sydney for over 15 years. After completing nine years with a Sydney CBD law firm Natalya started her own practice with office in Bondi Junction.

Natalya is a solicitor admitted to practise in the Supreme Court of NSW and the High Court of Australia.

Natalya holds Master of Law and Legal Practice and Master of International Trade Law degrees from University of Technology, Sydney and Bachelor of Laws with Honours majoring in International Law.

This Guide is for general information and reference purposes of clients and contacts of Boyarkina Lawyers and members of public interested in the subject matter. It is not a comprehensive exhaustive or complete information in relation to appointment of enduring guardian or any other matter brought up in this Guide.

The above information is relevant to appointments of enduring guardian under the NSW law for use in NSW and in some cases in other states of Australia (not overseas).

Information above does not constitute legal advice and should not be relied on as if it were a legal advice. A person should obtain professional legal advice specific to their circumstances before taking any action based on the above information.

Reasonable care is taken that information in this Guide is current at the time it was prepared (January 2024).

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