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TAKING CARE AND CONTROL OF YOUR HEALTH CARE  
DECISIONS

Guardianship

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## TAKING CARE AND CONTROL OF YOUR HEALTH CARE DECISIONS

### 1. Why do I need to consider the care and control of my health care decisions?

As you get older, you are more likely to have to make major decisions about your health, including regular and ongoing treatment, emergency procedures, and long term health care.

### 2. My consent to medical treatment

You can validly consent to medical treatment only when your consent is given freely. For example, if you consent merely because you believe you will otherwise be refused further treatment then your consent has not been validly given. In addition, you should receive accurate and appropriate information about your condition, treatments and proposed procedures.

To ensure that your consent is valid, you should be provided with as much information as possible. Amongst other things, you should be told and understand:-

- \* Your condition, or illness, including its severity or the result of any tests which you undergo
- \* the diagnosis of your condition and the accuracy of the assessment
- \* the various treatments which are available and the relative advantages and disadvantages of each, the risks associated with these, including possible side effects and likely outcomes
- \* what will be done, how long it will take and expected recovery time
- \* the financial cost of any procedures or treatment; and
- \* the qualification and experience of doctors and others who may be treating you.

Consent must be given for the particular procedure or treatment. If you consent to a particular course of action, the doctor (unless special circumstances arise) cannot carry out a different treatment.

In emergencies, where treatment is urgent and life saving, consent is not required to prevent serious damage to a patient's health or to prevent the patient from suffering significant pain, and the consent cannot be obtained, for example if you are unconscious.

### 3. What if I lack capacity to give consent?

In most cases, a doctor can only give you medical treatment if you have consented to that treatment (except in emergencies, as set out above). If you lack capacity, you cannot give consent to that treatment, unless you have specified your wishes about the treatment before losing capacity.

If you don't have capacity and you have not specified how you want to be treated before losing capacity, someone else will make the decision about whether you should receive medical treatment, and, if so, what sort of treatment that should be.

The Guardianship Act 1987 sets out a list of people who will make that decision for you if you lack capacity. The decision will be made by a "person responsible" who will be either:-

- a. a guardian or enduring guardian, or if there is no guardian or enduring guardian,
- b. the most recent spouse, de facto spouse or same sex partner with whom you have a close and continuing relationship; or, if there is no spouse, de facto spouse or same sex partner,
- c. an unpaid carer who is now providing support to the patient or provided support before the patient entered residential care; or if there is no carer,
- d. a relative or friend who has a close personal relationship with the patient.

4. Can a Court or Tribunal make decisions regarding my health care issues?

There is provision within the Guardianship Act 1987 for either the Guardianship Tribunal or a Court to appoint either a private guardian or a public guardian.

5. Can I appoint a Guardian to make these decisions?

Yes I can, pursuant to the provisions of the Guardianship Act 1987 NSW.

6. What are the types of Guardians in NSW?

There are three types of guardians in NSW:-

- a. enduring guardians – people appointed by the person with a disability, prior to that person's loss of capacity, to be his or her guardian;
- b. private guardians – close family members and/or friends who are appointed by the Guardianship Tribunal to be the guardian of a person with a disability; and
- c. public guardians – the NSW Public Guardian is a public official who can be appointed by the Guardianship Tribunal to be guardian of a person with a disability when there is no other person suitable to be a guardian.

When appointing a public or private guardian the Guardianship Tribunal must be satisfied that the proposed guardian's personality is generally compatible with the person under guardianship, that there is no undue conflict between the interests, and that the guardian is willing and able to exercise his or her functions.

7. Can I appoint a Guardian to make decisions regarding my health care issues,

even though I lose mental capacity?

You need to make clear your wishes about your future health care while you still have capacity. Some informal ways of doing this are by making your wishes known to friends, relatives and your doctor, and by writing your wishes down.

There are also some formal legal steps that you can take to ensure that your wishes are respected. In this respect, you may consider the following possibilities:-

- a. appointing an enduring guardian; and/or
- b. writing an advance health care directive – “living wills”.

#### 8. What is an Enduring Guardian?

An enduring guardian is someone that you appoint to make personal and life-style decisions and/or decisions about medical treatment on your behalf, if you are unable to make those decisions yourself. Appointing an enduring guardian determines who can make a decision on your behalf, but it does not deal with the content of those decisions. You may choose to rely on your enduring guardian’s ability to make decisions and have confidence that they will act in your best interests.

An enduring guardian appointed to consent to medical and dental treatment can only act under Part 5 of the Guardianship Act, which authorises them to consent to major and minor treatments that will promote and maintain the health and well-being of the person who has appointed them. An enduring guardian can consent to a medical or surgical procedure, operation, examination and any prophylactic, palliative or rehabilitative care customarily carried out by a medical practitioner. The authority to consent depends on the specific type of treatment. In particular, an enduring guardian cannot commit on your behalf for special treatment, which includes any new treatment that has not yet gained the support of a substantial number of medical practitioners or dentists specialising in that area.

The appointment of an enduring guardian must be in writing and in an approved form. Both you and your appointed enduring guardian must sign the document in front of your solicitor, barrister or a clerk of a local court. The appointment will only take effect when you no longer have the capacity to make decisions and are incapable of understanding the general nature and effect of proposed treatment and incapable of indicating your consent or opposition to the proposed treatment. You may appoint more than one enduring guardian to act on your behalf, or different enduring guardians with separate functions. Your enduring guardian must be over 18 years of age and not directly or indirectly involved in any aspect of your medical treatment.