Understanding **Substitute Decision-Making (WA)**

Your right to make your own decisions

At Opal HealthCare, we recognise the importance of encouraging older Australians to be as physically, socially, and emotionally autonomous as possible.

That's why we safeguard and support your right to make decisions about your care and services. If you lack the capacity to make certain decisions in your own best interest, it's important you have the right support, and a substitute decision-maker to make decisions on your behalf.

This resource will support you or someone you care about, to appoint a substitute decision-maker.

It's intended for general information only and doesn't constitute legal or financial advice. We recommend you consider your personal circumstances and seek professional advice, if needed.

What does it mean to have capacity? Having capacity means you can...

- Understand the nature and effect of your decisions about the matter.
- Freely and voluntarily make decisions about the matter.
- Communicate your decision in a way that can be understood.

Registered Supporters

You may wish to consider appointing and registering a trusted family member or friend as a 'Supporter' to help you to make decisions. The Supporter's role is to help you understand options, access information and communicate your decisions if you would like them to, but unlike substitute decision-makers, **they can't make decisions on your behalf.**

Supporters can only act with your consent and always in your best interest. Supporters do not replace authorised decision-makers. Supporters must be registered with My Aged Care.

Guiding Principles

- The presumption is that you have capacity to make your own decisions; substitute decision-making is a last resort.
- Your age, disabilities, appearance or behaviour are not indicators of whether or not you can make your own decisions.
- A substitute decision-maker may make decisions about the matters they were appointed for but not others.
- Substitute decision-makers must always act in your best interest and take into account your views and wishes, be these expressed verbally, in writing or via any other way of communication.

What type of decision needs to be made?

Financial and property

An **Enduring Power of Attorney** needs to be appointed to make financial and property decisions on your behalf if you are not able to make them for yourself.

Personal, lifestyle and treatment

An **Enduring Guardian** needs to be appointed to make personal, lifestyle and medical treatment decisions on your behalf if you are not able to make them for yourself.

Medical treatment

An **Advance Health Directive** document is a legal document that enables you to make decisions about the treatment you would want (or not want) to receive if you became sick or injured and were incapable of communicating your wishes.

Substitute decision-making for financial and property matters

Enduring Power of Attorney (EPOA)

An Enduring Power of Attorney is a **legal document** that appoints a trusted person to make **financial** and **property** decisions for you if you lose capacity to make these types of decisions for yourself.

- An EPOA must be appointed by you while you still have capacity to appoint one. If you don't have capacity, only a tribunal can appoint one.
- More than one EPOA can be appointed.
- You can choose for the arrangement to come into effect immediately or only if you lose capacity.
- If you choose for the EPOA to start immediately, this doesn't mean you can no longer make decisions about your property and finances. It means that if you want your attorney to be involved or begin handling certain financial tasks for you, they will have the legal authority to do so under your guidance.

Who can be an EPOA?

- **A person formally appointed by you if you have capacity.** You can appoint anyone you choose over the age of 18 years to assist you with money or property decisions. An EPOA can be a relative or friend and doesn't need to be a solicitor or professional.
- **A person appointed for you by a court or tribunal.** If you have lost capacity to appoint an EPOA (or there is an initiative to replace an EPOA appointed by you), a tribunal may appoint an administrator (someone known to you) to act on your behalf. If there is no trusted person available, the tribunal may appoint a Public Trustee to make decisions on your behalf.

- A family member, next of kin, health professional or your representative under the Aged Care Act **cannot** act as your EPOA unless they have been legally appointed by you with an authorising document or by a tribunal.

What can an EPOA do?

- Make property and financial decisions (e.g. daily budgeting, banking, buying and selling property)

- Make personal or lifestyle decisions
- Make decisions about medical treatment
- Make or change a will
- Vote
- Appoint a substitute attorney

Next steps

1. You must select a person to be your EPOA while you have capacity.

2. Discuss your wishes and request with the person you hope to appoint as your EPOA.

3. Contact a private solicitor or call the Public Trustee on **1300 746 116** to assist you with formalising your EPOA arrangements. You can also download the form yourself at **wa.gov.au**

4. The form must be signed by both you and the person you appoint as your EPOA. Your signature must be witnessed by two people who are authorised to witness the signing.

   * Two adult witnesses with full legal capacity are required to witness the signing. One must be an authorised witness, such as your doctor or bank manager. There is a list of people authorised to witness your signature on the Office of Public Advocate's website (**publicadvocate.wa.gov.au**). The other person is not required to be an authorised witness but cannot be you or the person you are appointing.

5. Store your document securely and ensure that your Care Community has a copy.

6. Remember that the Power of Attorney takes effect immediately or when you lose capacity to make financial and property decisions for yourself.

What happens if you lose capacity before you have appointed an Enduring Power of Attorney?

If you have lost capacity and have **not** appointed an EPOA, the only option is for a trusted person to apply to **State Administrative Tribunal (SAT)** to appoint a person to manage your financial and property affairs.

What orders can SAT make?

Appoint an administrator to manage your financial and property affairs.

SAT may appoint a family member, friend or trusted professional who is willing and able to take on the role of administrator.

OR

Appoint a public trustee to manage your financial and property affairs.

If **no** family member or friend is willing or able to take on the role of administrator, then the Public Trustee can be appointed to manage all, or part, of your financial and property affairs.

OR

Decide that you still have capacity and can either appoint your own EPOA or make financial and property decisions for yourself.

If you believe that someone has lost capacity to make decisions for themselves, please discuss your concerns with the General Manager in your Care Community.

Frequently asked questions about Power of Attorney

Q. **A.**

Who can assess a resident's capacity to make decisions?

To safeguard the rights of our residents to make autonomous decisions, Opal HealthCare will involve a medical practitioner such as a general practitioner or geriatrician to make a determination when capacity is in question.

What's the difference between a Power of Attorney (POA) and an Enduring Power of Attorney (EPOA)?

A Power of Attorney is valid only while a person has capacity. A Power of Attorney ceases when a person loses capacity. An Enduring Power of Attorney remains in place even when a person loses capacity to make decisions.

Q. **A.**

What's the difference between a Registered Supporter and a Substitute Decision-Maker?

A Registered Supporter is a close family member or friend chosen by you to help you to make your own decisions. Registered Supporters need to be registered with My Aged Care. The Supporter's role is to help you understand options, access information and communicate your decisions if you would like them to, but **not to make decisions on your behalf.**

Only an authorised substitute decision-maker legally appointed by you can make a decision on your behalf. If a Registered Supporter is also an authorised substitute decision-maker, they should support you to make decisions, and only step in and make a decision on your behalf if you are unable to assess the information and make an informed decision for yourself.

Can I appoint more than one EPOA?

If you have appointed more than one EPOA, you can specify if you want decisions to be made **jointly** (all decision-makers must agree for a decision to be binding) or **severally** (only one of the appointed decision-makers needs to make the decision or agree).

You can also appoint an alternative substitute decision-maker so that if the first is unwilling or unable to act (or relinquishes their role), the second person may step in to assume their responsibility.

Can I revoke or change an EPOA?

Yes. As long as you still have capacity, you can revoke any appointment you have made by informing the previously appointed EPOA in writing that you wish to terminate their appointment. You should let any relevant bodies know (such as banks) that you have terminated their appointment and destroy the appointment document. Appointing a new EPOA does not automatically cancel an existing EPOA. The appointing document must clearly state that it revokes previous appointments.

Substitute decision-making for personal, lifestyle and treatment decisions

Enduring Guardian

An Enduring Power of Guardianship is a **legal document** that appoints a trusted person to make **personal, lifestyle and treatment** decisions on your behalf, if you lose capacity to make these decisions for yourself.

- An Enduring Guardian must be appointed by you while you still have capacity to appoint one. If you don't have capacity, only a tribunal can appoint one.
- More than one Enduring Guardian can be appointed.
- Enduring Guardianship only comes into effect when you lose capacity, and is only effective during the period of incapacity, so it may never become operational.
- You also have the option of completing an Advance Health Directive, which enables you to make decisions about health care and treatment that you may receive in the future. An Advance Health Directive will take priority over an Enduring Power of Guardianship for treatments referenced in the Advance Health Directive document.

Who can be an Enduring Guardian?

- **A person formally appointed by you if you have capacity.** You can appoint anyone you choose over the age of 18 years to assist you with your personal, lifestyle and treatment decisions. An Enduring Guardian can be a relative or friend and doesn't need to be a solicitor or professional.
- **A person appointed for you by a court or tribunal.** If you have lost capacity to appoint an Enduring Guardian (or there is an initiative to replace an Enduring Guardian appointed by you), a tribunal may appoint a private guardian (someone known to you) to act on your behalf. If there is no trusted person available, the tribunal may appoint a Public Advocate as a Guardian of Last Resort.

- A family member, next of kin, health professional or your representative under the Aged Care Act **cannot** act as your Enduring Guardian unless they have been legally appointed by you with an authorising document or by a tribunal decision.

What can an Enduring Guardian do?

✓

- Make personal decisions (e.g. where you live and who you live with)
- Make decisions about contact with others
- Make decisions about medical, dental, and other health treatments (unless governed by your Advance Health Directive)
- Commence, defend, conduct or settle any legal proceedings on your behalf, except proceedings that relate to your property or estate

✗

- Draft or change your will
- Make legal, financial or property decisions
- Override your previously stated objections to medical treatment

Who can make decisions about my medical treatment?

If you need urgent treatment, a doctor can treat you without speaking to family or friends. For non-urgent treatment, the doctor will first consult your Advance Health Directive and if none exists (or it does not cover the required treatment decision), the doctor will get the decision from the first person in the following hierarchy:

1. Enduring Guardian with authority
2. Guardian with authority
3. Spouse or de facto partner
4. Adult daughter or son
5. Parent
6. Sibling (sister or brother)
7. Primary unpaid carer
8. Other person with a close personal relationship

Next steps

1. Select a person to be your Enduring Guardian while you have capacity to name a person.

2. Discuss your wishes and request with the trusted person you hope to appoint as your Enduring Guardian.

3. Contact a private solicitor or call the Public Trustee on **1300 746 116** to assist you with formalising your Enduring Power of Guardianship arrangements. You can also download the EPG form yourself at **wa.gov.au**

4. You and the person you appoint as your Enduring Guardian must sign the form in the presence of an eligible witness.

   * Two adult witnesses with full legal capacity are required to witness the signing. One must be an authorised witness, such as your doctor or bank manager. There is a list of people authorised to witness your signature on the Office of Public Advocate's website (**publicadvocate.wa.gov.au**). The other person is not required to be an authorised witness but cannot be you or the person you are appointing.

5. Store your document securely and ensure that your Care Community has a copy.

6. Remember that the powers of your appointed guardian only take effect if you lose capacity to make decisions for yourself.

What happens if you lose capacity before you have appointed an Enduring Guardian?

If you have lost capacity and have **not** appointed an Enduring Guardian, the only option is for a trusted person to apply to the **State Administrative Tribunal (SAT)** to appoint a person to act as your Guardian.

What orders can SAT make?

Appoint a private guardian to manage your personal, lifestyle and treatment affairs.

SAT may appoint a family member, friend or trusted professional who is willing and able to take on the role of private guardian.

OR

Appoint a public guardian to manage your personal, lifestyle and treatment affairs.

If **no** family member or friend is willing or able to take on the role of private guardian, then the Public Advocate can be appointed to manage all, or part, of your affairs.

OR

Decide that you still have capacity and can either appoint your own guardian or make personal, lifestyle and treatment decisions for yourself.

If you believe that someone has lost capacity to make decisions for themselves, please discuss your concerns with the General Manager in the Care Community.

Frequently asked questions about Guardianship

Q.

A.

Who can assess capacity to make personal, lifestyle and treatment decisions?

To safeguard the rights of our residents to make autonomous decisions, Opal HealthCare will involve a medical practitioner such as a general practitioner or geriatrician to make a determination when capacity is in question.

Can I revoke an Enduring Guardianship?

Yes. As long as you still have capacity, you can revoke any appointment you have made in the past. A written revocation is not required, however the Public Advocate recommends that you provide written notification to all Enduring Guardians and substitute Enduring Guardians informing them of the revocation. You should also let any relevant bodies know that you have terminated an appointment and destroy the appointment documentation.

Q.

A.

Can I appoint more than one Enduring Guardian?

If you've appointed more than one Enduring Guardian, you can specify if you want decisions to be made jointly (all decision-makers must agree for a decision to be binding) or if you are satisfied for decisions to be made by any one of the appointed decision-makers (severally).

You can also appoint an alternative substitute decision-maker so that if the first is unwilling or unable to act (or relinquishes their role), the second person may step in to assume their responsibility.

What's the difference between an Advance Health Directive and an Enduring Guardian?

An Advance Health Directive can be in addition to, or instead of, appointing an Enduring Guardian. Whilst an Advance Health Directive sets out your wishes and preferences for medical treatment, an enduring guardianship legally appoints someone to make these medical decisions on your behalf (which can be based on your Advance Health Directive if made).
We recommend having both an Advance Health Directive and an Enduring Guardian on separate forms.

Contacts

Public Trustee
Phone: 1300 746 116
Email: public.trustee@justice.wa.gov.au
Website: wa.gov.au

State Administrative Tribunal
Phone: 1300 306 017
Email: sat@justice.wa.gov.au
Website: sat.justice.wa.gov.au

Office of the Public Advocate
Phone: 1300 858 455
Email: opa@justice.wa.gov.au
Website: publicadvocate.wa.gov.au

Older Persons Advocacy Network (OPAN)
Phone: 1800 700 600
Website: opan.org.au

Aged Care Quality and Safety Commission
Phone: 1800 951 822
Email: info@agedcarequality.gov.au
Website: agedcarequality.gov.au

Resources

For a comprehensive range of resources to help you navigate substitute decision-making, please visit: **opalhealthcare.com.au/welcome/substitute-decision-making**

Opal

HealthCare