

Relevant legislation

- *Guardianship and Administration Act 2000* (Qld)
- *Mental Health Act 2000* (Qld), and the *Mental Health Bill 2015* (Qld) currently before Parliament.
- *Powers of Attorney Act 1998* (Qld)

Definitions

Administrator is a person appointed as a substitute decision maker for a financial matter by QCAT.

Advance health directive (AHD) is an enduring document made by a principal in which they can give directions about future health care and appoint a substitute decision maker (attorney) to make health decisions for the principal. An AHD only operates if the principal has impaired capacity for the matter.

Attorney refers to a substitute decision maker appointed under an AHD or EPA.

Capacity for a person for a matter, means the person is capable of—

- (a) understanding the nature and effect of decisions about the matter; and
- (b) freely and voluntarily making decisions about the matter; and
- (c) communicating the decisions in some way.

Enduring power of attorney (EPA) is an enduring document made by a principal in which they can appoint a substitute decision maker (attorney) to make financial decisions or personal decisions for the principal. An EPA for personal

decisions only operates if the principal has impaired capacity for the matter.

Financial matter means a matter relating to a person's financial or property matters, for example, paying rent, carrying on business or undertaking a real estate transaction.

General principles are set out under the *Guardianship and Administration Act 2000* (Qld) and the *Mental Health Act 2000* (Qld) to provide guidance on how substitute decision makers are to make decisions.

Guardian or Personal guardian is a person appointed as a substitute decision maker for a personal matter by QCAT.

Health matter means a matter relating to the care or treatment of, or service or procedure for, a person's physical or mental condition carried out by a health provider.

Personal matter means matters relating to a person's care, health or welfare, for example, where they live, what work or education they undertake, health care, and legal matters not relating to financial or property matters.

Principal refers to the person for whom a substitute decision maker makes decisions.

Public Guardian or Office of the Public Guardian is an independent statutory body that protects the rights and interests of adults with impaired capacity to make their own decisions

Public Trustee of Queensland is a self funding statutory authority that provides trustee, financial and related services, and may be appointed substitute decision maker for adults who have impaired capacity to make their own financial decisions.

Queensland Civil and Administrative Tribunal (QCAT) is an independent tribunal whose authority includes consideration of questions of capacity and the appointment of guardians and administrators.

Statutory health attorney (SHA) is appointed automatically to make health decisions for a principal where the principal has impaired capacity for the matter and there is no alternative substitute decision maker. An SHA is the first of:

- the principal's spouse where that relationship is close and continuing,
- the principal's carer who is not a paid carer,
- the principal's friend or family member who is not a paid carer; or
- the Public Guardian.

Substitute decision maker is a person who stands in the shoes of the principal and who can make all decisions the principal themselves could make. A substitute decision maker can be informal, appointed by the principal under an EPA or AHD, or may be appointed for the principal under a SHA or by QCAT.

When is a substitute decision maker needed?

If a person does not have capacity to make a decision for themselves, they may

need a substitute decision maker to make the decision for them.

Presumption of capacity

All adult persons are presumed to have capacity to make all decisions unless there is evidence to the contrary to rebut the presumption.

Capacity:

- can fluctuate according to medical condition;
- will be different depending on the decision to be made;
- is different to the decision itself – an apparently unwise decision does not mean the person lacks capacity to make the decision;
- should not be assessed solely on the basis of appearance, age, behaviour or disability;
- may be increased with appropriate support.

People should be supported to make their own decisions as far as possible.

Substitute decision making should be a last resort.

How is a formal substitute decision maker appointed?

By the person

appointing an attorney under an advance health directive (AHD)

appointing an attorney under an enduring power of attorney (EPA)

For the person

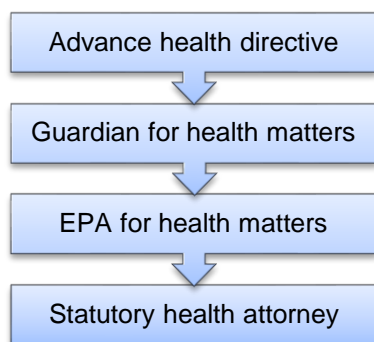
by the appointment of a guardian or administrator by QCAT

under a statutory health attorney

An attorney, statutory health attorney, guardian or administrator:

- must be at least 18 years old;
- must not be a paid carer, health provider or service provider for the principal;
- for financial matters, must not be a bankrupt;
- may be the Public Trustee for financial matters, or the Public Guardian for personal/health matters.

Where a person has impaired capacity for a health matter, substitute decision makers have the following priority:



A person making an EPA or AHD must:

- have capacity to do so, and be free from undue influence;
- complete and sign the approved form in the presence of a witness;
- for AHDs, include a certificate from a doctor certifying the person's capacity to make the AHD; and
- ensure that the attorney has signed the EPA or AHD accepting the appointment.

Duties of substitute decision makers

A substitute decision maker must apply the general principles in the performance of their functions. This includes recognising:

- the right of all people to the same basic human rights;
- the principal's right to be a valued member of society;
- the principal's right to participate, to the greatest extent practicable, in decisions affecting the principal's life;
- the importance of encouraging and supporting the principal to achieve maximum potential and self-reliance;
- the importance of maintaining the principal's supportive relationships, community participation, environment and values.

Importance of substitute decision makers in mental health decisions

A person may receive involuntary treatment for mental illness, whether or not the patient or their substitute decision maker agrees, under the *Mental Health Act 2000* (Qld).

However, there can still be value in appointing a substitute decision maker:

- a person's treatment plan must take into account an existing AHD;
- a person can appoint their allied person under an AHD, in the event that they lose capacity to do so (otherwise, the Public Guardian may be appointed);
- a voluntary patient may not be treated with electroconvulsive therapy if they have voiced their objection to that treatment under an AHD or EPA.
- attorneys and personal guardians have a right to certain notifications, including if the principal becomes an

involuntary patient and of Mental Health Review Tribunal hearings.

Right to information

A guardian, attorney or statutory health attorney, who has power for a health matter, has a right to information from the health provider treating the principal, unless the health provider has a reasonable excuse. This is so the substitute decision maker has all the information necessary to make an informed decision.

Under the new *Mental Health Bill 2015* (Qld), the existence of an AHD, personal guardian, attorney under an EPA, or statutory health attorney will be even more important:

- Instead of being placed under an involuntary order, a patient may (but not always) be treated under the authority of an AHD, or with the consent of a personal guardian, attorney for health matters or statutory health attorney.
- The views, wishes and preferences expressed in an AHD must be taken into account by the treating team when deciding the nature and extent of treatment and care to be provided under an involuntary order.
- If a doctor decides to make an involuntary order despite an AHD or the nature and extent of treatment and care is inconsistent with an AHD, the doctor must explain to the patient the reasons why and record these reasons in the patient's health records.

- Independent patient rights advisors, whose role will be to help patients and their support network understand their rights and communicate with the treating team, must work cooperatively with any personal guardians or attorneys to further the patient's interests.

Applying to QCAT

QCAT can:

- Make declarations about a person's capacity;
- Appoint a guardian or administrator;
- Review the appointment of a guardian or administrator, and revoke or change that appointment;
- Decide the validity of an EPA or AHD.

QCAT can make an (urgent) interim order, lasting not more than 3 months, if it is satisfied that there is an immediate risk of harm to the health, welfare or property of the principal.

Otherwise, most applications will need to be decided at a hearing which may be attended by all interested persons.

An order appointing a guardian or administrator may be limited to a specific matter and for a specific time period. For example, a guardian may be appointed in relation to health and accommodation matters only for a period of 2 years.

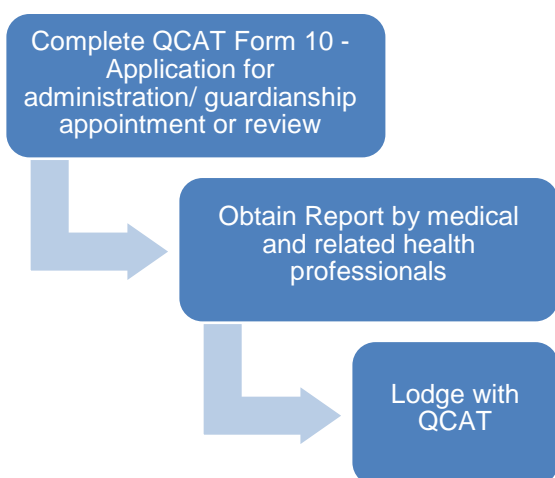
A guardian or administrator will only be appointed for a matter where:

- The principal has impaired capacity for the matter; and
- There is a need for a decision in relation to the matter, or the principal is likely to do something in relation to

the matter that involves unreasonable risk to the adult's health, welfare or property; and

- Without an appointment the principal's needs will not be adequately met, or their interests will not be adequately protected.

To apply for, or challenge, the appointment of a guardian or administrator:



Resources

Office of the Public Guardian

www.publicguardian.qld.gov.au – provides a free Guardianship Information Service for guardians; information, AHD and EPA forms.

Tel: 1300 653 187

Queensland Advocacy Incorporated (QAI)

www.qai.org.au – provides legal advice and representation in relation to guardianship, administration, restrictive practices and mental health law.

Tel: (07) 3844 4200

Queensland Aged and Disability

Advocacy (QADA) Inc www.qada.org.au – provides advocacy support in relation to

guardianship and administration matters.

Tel: 1800 818 338

Queensland Civil and Administrative

Tribunal www.qcat.qld.gov.au –

information and QCAT forms.

Tel: 1300 753 228

The Public Trustee of Queensland

www.pt.qld.gov.au – information about Public Trustee services

Tel: 1300 360 044

This factsheet is for general information purposes only. Independent legal advice should be sought for thorough advice on this area.

This factsheet has been prepared as part of a joint project between Queensland Advocacy Incorporated (QAI) and Queensland Aged and Disability Advocacy (QADA) Inc to deliver training for mental health consumers and carers on understanding the guardianship framework in Queensland.

QAI is a systems and legal advocacy community legal centre for vulnerable people with disability in Queensland (www.qai.org.au).

QADA is a not-for-profit advocacy service that gives people a voice through information, education and advocacy support (www.qada.org.au).

QAI and QADA gratefully acknowledges funding for this project from Legal Aid Queensland.

Last updated: 30 October 2015

GENERAL PRINCIPLES (Extract Only)
Guardianship and Administration Act 2000 (Qld), Schedule 1

1 Presumption of capacity

An adult is presumed to have capacity for a matter.

2 Same human rights

- (1) The right of all adults to the same basic human rights regardless of a particular adult's capacity must be recognised and taken into account.
- (2) The importance of empowering an adult to exercise the adult's basic human rights must also be recognised and taken into account.

3 Individual value

An adult's right to respect for his or her human worth and dignity as an individual must be recognised and taken into account.

4 Valued role as member of society

- (1) An adult's right to be a valued member of society must be recognised and taken into account.
- (2) Accordingly, the importance of encouraging and supporting an adult to perform social roles valued in society must be taken into account.

5 Participation in community life

The importance of encouraging and supporting an adult to live a life in the general community, and to take part in activities enjoyed by the general community, must be taken into account.

6 Encouragement of self-reliance

The importance of encouraging and supporting an adult to achieve the adult's maximum physical, social, emotional and intellectual potential, and to become as self-reliant as practicable, must be taken into account.

7 Maximum participation, minimal limitations and substituted judgment

- (1) An adult's right to participate, to the greatest extent practicable, in decisions affecting the adult's life, including the development of policies, programs and services for people with impaired capacity for a matter, must be recognised and taken into account.
- (2) Also, the importance of preserving, to the greatest extent practicable, an adult's right to make his or her own decisions must be taken into account.

...

- (5) However, a person or other entity in performing a function or exercising a power under this Act must do so in a way consistent with the adult's proper care and protection.

....

8 Maintenance of existing supportive relationships

The importance of maintaining an adult's existing supportive relationships must be taken into account.

9 Maintenance of environment and values

- (1) The importance of maintaining an adult's cultural and linguistic environment, and set of values (including any religious beliefs), must be taken into account.
- (2) For an adult who is a member of an Aboriginal community or a Torres Strait Islander, this means the importance of maintaining the adult's Aboriginal or Torres Strait Islander cultural and linguistic environment, and set of values (including Aboriginal tradition or Island custom), must be taken into account.

...

10 Appropriate to circumstances

Power for a matter should be exercised by a guardian or administrator for an adult in a way that is appropriate to the adult's characteristics and needs.

11 Confidentiality

An adult's right to confidentiality of information about the adult must be recognised and taken into account.