



Government of **Western Australia**
Department of **Justice**

Private Guardian's Guide

Preface

This guide is produced by the Office of the Public Advocate. The Public Advocate is the independent statutory officer appointed by the Western Australian Government to protect and promote the human rights of Western Australian adults with a decision-making disability.

The Public Advocate is responsible for making decisions for vulnerable adults who are unable to make decisions for themselves. The Public Advocate therefore understands the often difficult and complex task it is, stepping into another person's shoes and making decisions in their best interests.

The purpose of this guide is to provide information for people who are considering taking on the role of guardian. There is also information for people who have been appointed as a guardian by the Western Australian State Administrative Tribunal.

The information contained in this guide is specific to Western Australia, as different States and Territories have their own legislation covering guardianship.

Common questions about the role and responsibilities of a guardian are answered.

A guardian cannot make decisions about a person's property and finances; only an attorney or administrator can make these decisions.

The Public Trustee provides a range of support and information, including a Private Administrator Support Team and Private Administrator's Guide for family members and friends who are appointed by the State Administrative Tribunal as someone's administrator. If you have been appointed as a private administrator there is more information about this role on the Public Trustee's website:

www.publictrustee.wa.gov.au

The information provided in this guide may also be helpful for people who have been appointed under an enduring power of guardianship. However, more specific information about the role of enduring guardians is provided in the Office of the Public Advocate's publication 'A Guide to Enduring Power of Guardianship in Western Australia'.

If you are interested in planning for a time in your own future when you may no longer have capacity to make decisions for yourself, you may want to consider making an enduring power of guardianship and/or an enduring power of attorney. Guides and kits regarding these documents can be downloaded from the Office of the Public Advocate's website: www.publicadvocate.wa.gov.au

It is hoped that the knowledge and experience of the Office of the Public Advocate is captured in this guide, in a way which gives private guardians the information and tools they need to carry out this important role.

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Public Advocate

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Copies of this guide and other Office of the Public Advocate publications can be downloaded from the Office's website. Further information and advice can also be obtained from the Office's telephone advisory service: 1300 858 455.

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Introduction

The *Guardianship and Administration Act 1990* is the legal framework which provides assistance for adults who cannot make decisions in their own best interests. The information contained in this guide is specific to Western Australia, as different States and Territories have their own legislation covering guardianship.

Under the Act, every person is presumed to be capable of looking after their own health and safety, making reasonable judgements about personal matters, managing their own affairs, and making reasonable judgements about their estate unless the contrary is proven to the satisfaction of the State Administrative Tribunal (the Tribunal).

The primary concern of the Tribunal is the best interests of any represented person or of a person about whom an application has been made.

One of the underpinning principles of the *Guardianship and Administration Act 1990* is the 'less restrictive alternative'. This means that when an adult cannot make decisions for themselves, the support provided to them for decision-making should be done in the least restrictive way possible.

The least restrictive way for a person to make decisions is for them to make their own decisions independently.

However, when a person has a decision-making disability (from an intellectual disability, dementia, an acquired brain injury or a mental illness), they may not be able to make their own decisions, or in making decisions, they might put themselves at risk of neglect, exploitation or abuse.

When this happens, there are a variety of ways to assist a person with a decision-making disability, including:

- a trusted family member or friend informally supports the person to make decisions
- a substitute decision-maker that they appointed themselves under an enduring power of attorney and/or enduring power of guardianship when they had capacity makes decisions
- a guardian and/or administrator is appointed by the Tribunal to make decisions.

If a person has not completed an enduring power of attorney and/or enduring power of guardianship or the documents are not working properly and informal supported decision-making arrangements are not possible or not working in the person's best interests, the person may need a guardian and/or administrator appointed by the Tribunal.

The *Guardianship and Administration Act 1990* gives the Tribunal the power to legally appoint substitute decision-makers, namely, guardians and administrators.

However, the appointment of a guardian and/or administrator involves taking away a person's fundamental decision-making rights, so it is a course of action which is only taken by the Tribunal as a last resort. It is only done after all less restrictive measures to ensure the person's wellbeing and safety have been considered and found to be inadequate or unsuitable.

A guardian can be authorised to make decisions about personal, lifestyle and medical treatment matters. Often a family member or close friend is appointed as guardian. If the person needing a guardian does not have anyone suitable, willing and available to act as their substitute decision-maker, the Public Advocate may be appointed as their guardian.

For family members and friends who are considering taking on the role of guardian, or who have been appointed by the Tribunal as someone's guardian, the Office of the Public Advocate has developed this guide to provide information and support.

Using this Guide

This guide covers a great deal of information regarding complex issues.

Every attempt has been made to keep this guide as user-friendly as possible.

The first part of this guide contains information for people considering taking on the role of guardian.

Parts 2 to 5 assume you have been appointed as guardian and work through a range of information you might need to carry out the role.

Disclaimer

The materials presented in this guide are provided voluntarily as a public service. The information and advice provided is made available in good faith but is provided solely on the basis that readers will be responsible for managing their own assessment of the matters discussed herein and that they should verify all relevant representations, statements and information. Neither the State of Western Australia ("State") nor any agency or an instrumentality of the State shall be responsible for any loss or damage howsoever caused and whether or not due to negligence arising from the use or reliance on any information or advice provided in the guide. Changes in circumstances after the date of publication of the publication may impact upon the currency of the information contained in the publication. No assurance is given that the information contained in the publication is current at the time it is provided to the reader.

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Key terms used in this guide

Administrator – A person appointed by the State Administrative Tribunal who is given legal authority to make decisions about property and finances in the best interests of a person with a decision-making disability.

Advance Health Directive (AHD) – A legal document in which an adult with full legal capacity sets out their future medical, surgical or dental treatment and other health care. This document then speaks for them if they become unable to make decisions or communicate their wishes.

Attorney – A person or organisation appointed under an enduring power of attorney by an adult with full legal capacity to make property and financial decisions on their behalf.

Best interests – The guardian is required to act in the represented person's best interests. The term 'best interests' is addressed in section 51 of the *Guardianship and Administration Act 1990* (see part 2.3).

Capacity – Refers to whether a person is able to fully understand the decisions they need to make and the potential outcome of making those decisions.

Decision-making disability – A general term used to describe someone who has a disability which affects their ability to understand information and to make informed and reasonable decisions. A person may have a decision-making disability as a result of:

- intellectual disability (usually from birth, for example Down syndrome or foetal alcohol syndrome)
- mental illness (such as depression or schizophrenia)
- acquired brain injury (such as from a fall or car accident)
- substance related brain damage (a result of using too many drugs or drinking too much alcohol)
- dementia (a disease of the brain).

Enduring Guardian – A person appointed under an enduring power of guardianship (prior to the appointor losing capacity) to make personal, lifestyle, treatment and medical research decisions on behalf of the appointor.

Enduring Power of Attorney (EPA) – A legal document in which an adult with full legal capacity nominates someone to make decisions about finances and property. The person appointed is called an attorney.

Enduring Power of Guardianship (EPG) – A legal document in which an adult with full legal capacity nominates someone to make personal, lifestyle, treatment and medical research decisions on their behalf, if they lose capacity. The person appointed is called an enduring guardian.

Guardian – A person appointed by the State Administrative Tribunal who is given legal authority to make personal, lifestyle, treatment and medical research decisions in the best interests of an adult with a decision-making disability.

Represented person – A person with a decision-making disability for whom the State Administrative Tribunal has made an order appointing a guardian and/or administrator.

State Administrative Tribunal (the Tribunal) – The State Administrative Tribunal is an independent statutory body responsible for appointing a guardian and/or administrator who must make decisions in the best interests of a person with a decision-making disability.

1.0 What to consider before becoming a guardian

If you have been asked to consider being someone's guardian, you may have questions about the role. This part of the guide will give you an understanding of what a guardian is and what your role would be if you were to accept an appointment as guardian. This part should help you to decide whether you think you could take on the role.

1.1 What is a guardian?

Under the *Guardianship and Administration Act 1990*, a guardian is a person appointed by the State Administrative Tribunal who is given legal authority to make personal, lifestyle, treatment and medical research decisions for an adult with a decision-making disability. A guardian must be over the age of 18 years and have full legal capacity.

The person with a decision-making disability may not be able to look after their own health and safety, or they may not be able to make reasonable judgements and informed decisions about personal matters.

After the State Administrative Tribunal has made an order appointing a guardian, the person with a decision-making disability is known as the represented person.

1.2 What is the State Administrative Tribunal?

The State Administrative Tribunal (the Tribunal) is an independent statutory body which accepts applications from any person or body for the appointment of a guardian or administrator. Usually it will be a family member or friend who makes the application, but health professionals, social workers, other service providers or agencies may apply.

1.3 How do I apply to the Tribunal?

To make an application to the Tribunal visit the eCourts portal:
<http://ecourts.justice.wa.gov.au/eCourtsPortal/>

You can select the relevant application form/s if known, or answer some questions which will direct you to the appropriate application form/s. When you are ready to apply, you will be directed to a login screen (for already registered users) or a registration page (for first time users). Once logged in or registered you can proceed with your application and submit it, or save your progress to complete later.

If you are unable to make an application via the eCourts portal please contact the Tribunal for assistance (see part 4.3).

There is no cost involved in making an application to the Tribunal. More information about making an application is available on the Tribunal's website:
www.sat.justice.wa.gov.au

Once an application for the appointment of a guardian has been made, the Tribunal will conduct a hearing to determine whether it would be in the person's best interests to have a guardian appointed.

1.4 What will happen at the Tribunal hearing?

At the hearing, the presiding member of the Tribunal (the person in charge of the hearing) will explain why the application has been made.

The person who made the application will have the opportunity to put forward their views about why it would be in the best interests of the person with a decision-making disability to have a guardian appointed. Usually, the person who made the application will attend the hearing in person, but they may be able to attend by phone or videolink.

The person who is named in the application will also be invited to attend the hearing and will be given an opportunity to state their views and preferences unless they are unable to do so.

The Tribunal considers a range of information about the circumstances and needs of the person concerned, before making a decision about whether the person needs a guardian.

The Tribunal looks at:

- whether the person has a decision-making disability (this will involve looking at medical evidence)
- whether the impact of the disability on the person means that they do not have the ability to make their own decisions in some or all areas of their life
- whether there is a need for someone else to be involved in making any decisions
- whether the appointment of a guardian is in the best interests of the person with a decision-making disability and the only way that decisions can be made (the Tribunal will consider if there are informal ways to support the person to make decisions)
- the areas of a person's life a guardian would need to make decisions in
- who is the most suitable person to be appointed as guardian
- how long any guardianship order should be made for.

In many hearings there will also be an application for the appointment of an administrator for the person. The Tribunal will also consider all the above in relation to the person's property and financial decision-making needs. If the Tribunal determines that a person needs assistance in these areas, an administrator can be appointed.

It is not usual for people to have legal representation (a lawyer) at Tribunal hearings. The Tribunal provides information and conducts hearings in a way that enables people to represent themselves rather than engaging legal representation. However, you can do this if you want.

1.5 What happens if someone has an enduring power of guardianship or advance health directive?

A person who has full capacity can make choices about their future decision-making in case they lose capacity by making an enduring power of guardianship or an advance health directive (see part 4.6).

If an application for guardianship has been made to the Tribunal and the person has an enduring power of guardianship, the Tribunal will determine whether this is working in the person's best interests before making a guardianship order.

There may be many reasons why the enduring power of guardianship is not working in the person's best interests and the Tribunal will need to consider these in deciding whether or not to appoint a guardian.

If someone has an advance health directive, a person who is appointed as guardian to make treatment decisions generally cannot go against the decisions that a person has made in their advance health directive. More information about making treatment decisions is covered in part 3.1.

1.6 What kind of decisions would I have to make as a guardian?

If you are appointed as a guardian, the Tribunal will determine at the hearing what authority you have. This will be stated on the guardianship order which will be sent to you after the hearing.

The kinds of decisions you might have to make will depend on the authority you are given in the order, and may cover a range of personal, lifestyle, treatment and medical research decisions.

The authority you are given might include the authority to make decisions about:

- where the represented person is to live, whether permanently or temporarily
- who the represented person lives with
- whether the represented person works and, if so, any matters related to that work
- treatment - provide or refuse consent to any treatment for the represented person (see part 3.1.1)
- whether the represented person can participate in approved medical research (see part 3.1.7)
- what education and training the represented person receives
- who the represented person associates with
- whether to commence, defend, conduct or settle any legal proceedings on the represented person's behalf, except proceedings that relate to the represented person's property or estate (see section 1.8)
- services the represented person may need
- other matters as specified by the Tribunal.

1.7 Who can be appointed as a guardian?

Anyone who is 18 years of age or older and has full legal capacity can be appointed as a guardian, if the Tribunal believes that:

- they will act in the best interests of the proposed represented person
- they are not in a position where their interests conflict or may conflict with the interests of the proposed represented person
- they are otherwise suitable to act as the guardian.

In deciding whether a person is suitable to be a guardian, the Tribunal will consider:

- the desirability of preserving existing family relationships
- the compatibility of the proposed guardian with the proposed represented person (and any existing or proposed administrator)
- the wishes of the proposed represented person
- whether the proposed guardian will be able to perform the functions of a guardian.

The Tribunal will also look at who is willing to be appointed as guardian and where possible they will choose a family member or friend of the represented person.

Sometimes this may not be possible. If there is not a family member or friend who is suitable and willing to be appointed as the person's guardian, the Tribunal may appoint the Public Advocate as the guardian of last resort.

The Tribunal can appoint one person as a sole guardian or they may choose to appoint more than one person as joint guardians. Joint guardians must make decisions together at all times.

It is also possible to make more than one guardianship order and appoint two or more different people with different authorities. For example, the Tribunal may appoint one person with authority to make decisions in relation to accommodation and services, and another person with authority to make decisions in relation to treatment.

1.8 What should I know about the role?

As a guardian you have the legal responsibility to make personal, lifestyle and treatment decisions in the best interests of the person you represent.

The easiest way to think of the role is to imagine that you 'stand in the shoes' of the person you represent. You then need to think about how that person may have made each decision (if they were able to); what may have been important to them when making decisions about their life; and you should, as far as possible, talk with the represented person about what they think and want. Ultimately you will need to make any decision using all the information you can gather and think about what is best for them now.

Sometimes this may mean you need to make a decision that the represented person does not like. It is important to think about how you would feel if you had to do this. If you do not think you could make a decision the person would not like although it is in their best interests, then you need to think about whether you would want to be appointed as guardian.

A guardian is often appointed by the Tribunal with the authority to make treatment decisions. This means you might have to make decisions about whether the represented person should have regular dental check-ups or a flu vaccination annually; or you could be asked to provide or refuse consent for a medical or surgical procedure on behalf of the represented person. Sometimes the Tribunal will also provide a guardian with specific authority to make treatment decisions about the represented person's participation in approved medical research (see part 3).

In some cases you may also have been appointed as 'next friend' to start, carry out or finalise any legal proceedings on behalf of the represented person, or you may have been appointed as 'guardian ad litem' to defend or finalise any legal proceedings against the represented person. This does not include matters relating to the represented person's property or estate.

In relation to criminal proceedings, you may have a role in arranging legal representation but you cannot plead guilty or not guilty, nor instruct a lawyer, on behalf of the represented person.

Any action you take, or decision you make, on behalf of the represented person for whom you have been appointed guardian, has the effect of having been done by the represented person themselves, as if they still had the capacity to do it.

In effect, you have been appointed as a substitute decision-maker for a person who is unable to make reasonable judgements about their own lifestyle, health care and treatment decisions, and you must act in their best interests.

1.9 Do I have to take on the role of guardian?

No, you do not have to take on the role of guardian.

You may feel a sense of obligation to take on the role, but you should read this guide and speak to people about how taking on this role would fit into your life and the types of decisions you will need to make.

When deciding if you want to be a guardian or not, you should consider:

- whether you will have the time to dedicate to the role
- whether you will be available when decisions are needed
- whether it is something you want to do
- whether it will affect your relationship with the person
- whether you feel confident that you will be able to make decisions in the best interests of the person.

You may come to the conclusion that you do not want to take on the role because, for example:

- you feel overwhelmed with the job of caring for the person and feel that the added responsibility of being the person's guardian is too much to take on
- you may frequently travel and be difficult to contact, which will mean your availability to make decisions is limited
- you may know that there are a number of decisions that need to be made which the person is going to be unhappy about and you want to protect your relationship with them, rather than having to make decisions they won't like.

1.10 What will happen if I don't take on the role of guardian?

If you decide, for whatever reason, that you do not want to take on the role of guardian, and the Tribunal decides that there is a need for a guardian to be appointed, they will consider whether there is anyone else who is suitable, willing and available to take on the role.

This may mean that a family member or friend of the person is appointed as guardian, or, if there is no one else who is suitable, willing and available, the Public Advocate might be appointed as the person's guardian.

1.11 Will the Tribunal definitely appoint me as guardian?

Even if you believe you are the closest person to the represented person and you propose yourself as guardian, there is no guarantee that the Tribunal will appoint you in the role.

The Tribunal may decide that a proposed guardian is unsuitable because:

- appointing them might negatively affect family relationships
- they might not be able to work well with the administrator (person managing the represented person's money), if one has been appointed
- their appointment might not be consistent with the wishes of the represented person
- the Tribunal might not be confident that they will be able to manage the role.

1.12 What will happen if the Tribunal doesn't appoint me as guardian?

If the Tribunal decides that you are not suitable to be appointed as guardian, but believes there is a need for a guardian to be appointed, they will consider whether there is anyone else who else is suitable, willing and available to take on the role.

If there is not a family member or friend who is suitable and willing to be appointed as the person's guardian, the Tribunal may appoint the Public Advocate as the guardian of last resort.

1.13 Checklist for considering taking on the role of guardian

The following questions may help you to decide whether you want to take on the role of guardian:

- Am I at least 18 years of age and have full legal capacity?
- Am I the right person to take on this role?
- Do I understand that I would have legal obligations?
- Do I know the person well?
- Am I prepared to be contacted whenever decisions are needed?
- Am I able to put the person's best interests first when making decisions?
- Am I able to make a decision that the person may not agree with?
- If they have made enduring power of attorney or have an administrator appointed, will I be able to work with that person?
- Will I be able to work with the other people involved in the person's life who may want to be informed about my decisions or who may not agree with my decisions?

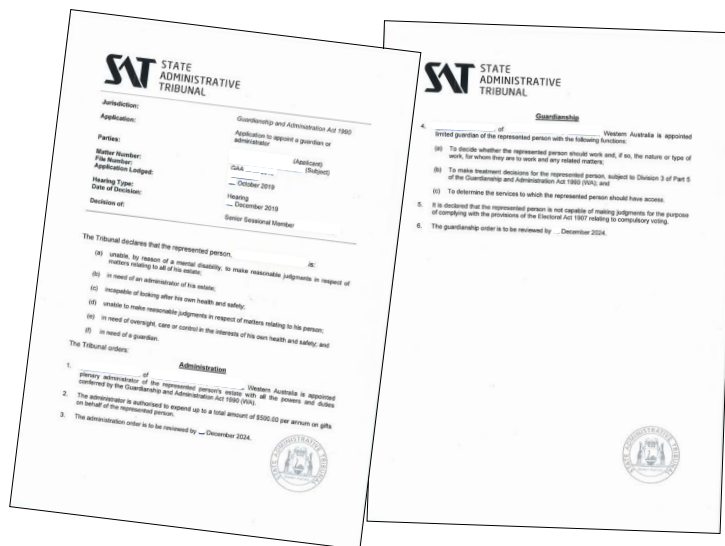
2.0 I have been appointed guardian. What do I need to know?

Now that you have been appointed guardian you probably have more questions about the specifics of the role. This part should help you to learn more about the important role that you have taken on and provide the information you need to get started in the role.

2.1 What authority do I have?

Once the State Administrative Tribunal (the Tribunal) hearing has been held and you have been appointed as guardian, you will receive a document called a guardianship order.

The guardianship order will look similar to this:



The extent of your decision-making authority will be stated clearly on the order provided to you by the Tribunal.

If you have been appointed as a **plenary guardian**, you may make all personal, lifestyle and treatment decisions. These include decisions about:

- where the represented person is to live, whether permanently or temporarily
- who the represented person lives with
- whether the represented person works and, if so, any matters related to that work
- treatment - provide or refuse consent to any treatment for the represented person (see part 3.1)
- what education and training the represented person receives
- who the represented person associates with
- whether to commence, defend, conduct or settle any legal proceedings on the represented person's behalf, except proceedings that relate to the represented person's property or estate (see part 1.8)
- services the represented person may need
- other matters as specified by the Tribunal.

I HAVE BEEN APPOINTED
GUARDIAN. WHAT DO
I NEED TO KNOW?

If you have been appointed as a **limited guardian**, your decision-making authority is limited to the functions authorised in the order from the Tribunal.

If you are appointed with limited functions, there may be times when you are asked to make a decision which is outside your authority under the guardianship order. You may be able to make this decision in an informal way, but sometimes it may be necessary for you to apply to the Tribunal to change the terms of the guardianship order (see parts 2.11 and 2.12).

It is important that you read the guardianship order to understand in what areas you are entitled to make decisions in and how long the order will last for (see part 2.10).

If there is something in the published order that you were not expecting you may wish to call the Tribunal to discuss this.

2.2 Are there any decisions I cannot make as a guardian?

A guardian cannot do any of the following on behalf of the represented person:

- vote in any election
- consent to the adoption of a child or the adoption of the represented person
- consent to the making of a surrogacy parentage order
- consent to marriage, or to the marriage of their minor child (under 18 years of age)
- consent to sterilisation without the written approval of the Tribunal
- make or alter a Will without an order from the Supreme Court
- sign a statutory declaration.

When the *Voluntary Assisted Dying Act 2019* is operational in Western Australia, a guardian will not be able to make a decision for a represented person under the *Voluntary Assisted Dying Act 2019*, as a patient must have decision-making capacity to make a voluntary assisted dying decision.

Nothing in the *Guardianship and Administration Act 1990* authorises the making of a treatment decision, whether in an advance health directive or otherwise, in relation to voluntary assisted dying decisions.

A guardian has no authority to make decisions about the represented person's finances, property or estate. This is the role of an attorney or administrator.

You may have both functions if:

- the person has made an enduring power of attorney appointing you as their attorney before they lost capacity, or
- you have been appointed as the represented person's administrator by the Tribunal.

If so, you can make decisions about their property and finances under this authority.

Alternatively, if another person has the authority to manage the person's finances, property or estate, you will need to work with them when decisions overlap your authority as guardian and their authority as attorney or administrator.

If the person does not have anyone appointed (an attorney or administrator) to manage their finances, property or estate, you may be assisting them with financial decisions in an informal way. However, you would not be doing this with any authority under the guardianship order.

If decisions about the represented person's finances, property or estate are required and these informal arrangements are not working in the person's best interests, an application can be made to the Tribunal for the appointment of an administrator (see part 4.5).

2.3 How must I act as a guardian?

As a guardian, you must always act in the best interests of the represented person.

The principles guiding you to make such decisions are detailed in section 51 of the *Guardianship and Administration Act 1990* (the Act) and include:

- advocating for the person
- encouraging the person to participate as much as possible in community life
- encouraging and assisting the person to care for themselves and make decisions about their own life
- protecting the person from neglect, abuse and exploitation
- consulting with the person and considering their wishes
- maintaining any supportive relationships the person may have
- maintaining the cultural, linguistic and religious environment of the person.

Making decisions on behalf of another person can be difficult. It is important not to feel pressured into making a decision until you are confident you have been given all of the relevant information required to make an informed decision.

Although the principle of consulting with the represented person should be followed and their preferences respected as far as practicable, it may not always be possible for you to make decisions that are in accordance with the person's wishes.

The case study below shows how you may take the wishes of the represented person into account, but in making a decision in the represented person's best interests, it may not always be possible to act fully in accordance with their wishes.

CASE STUDY

| | |
|---|---|
| Issue | Health professionals have recommended that the represented person move into an aged-care facility. |
| Function | The guardian has authority to decide where the represented person will live. |
| Decision to be made | Where the represented person will live. |
| Consultation with the represented person | The represented person wants to stay in his own home where he is in familiar territory and close to friends. |
| Decision made by the guardian | Based on professional advice the guardian decides it is not practical nor in the represented person's best interests for him to remain at home. The guardian investigates local accommodation providers and finds an aged-care facility close to the represented person's home and friends. |

If the represented person has more than one guardian with authority to make accommodation decisions, these joint guardians will need to agree on the decision.

If the represented person also has an administrator or attorney who looks after their finances, the administrator or attorney would need to be consulted to find out if the represented person can afford to live in the accommodation that has been chosen.

2.4 How do I establish the represented person's views and wishes?

You will possibly already have a good idea of the represented person's views and wishes, things that are important to them, activities they enjoy, any cultural or religious traditions they follow. If there are things that you are unsure of, it is important to talk to the represented person if possible, in order to gather their views and wishes on important issues. You could also talk to other family members and friends who know them well.

2.5 What is the difference between the way I do the job as a private guardian and when the Public Advocate is appointed as guardian?

If the Tribunal decides that there is not a family member or friend available to appoint as a private guardian, and as a last resort they appoint the Public Advocate as guardian, they will carry out the role differently than a family member or close friend would.

While both the Public Advocate and private guardians are bound by the same principles within the legislation, the Public Advocate has a more restricted role in the person's life than a family member or friend would do.

This is because of the personal relationship a private guardian shares with the represented person. They will know the person better and have a good idea of their previous wishes, things that were important to them, their past activities, and the family and friends who they spent time with.

A private guardian is also likely to be involved in some aspects of their care. They may see them on a regular basis, take them on outings and appointments and be involved in their life for things other than just making decisions.

When the Public Advocate is appointed as guardian, this authority is delegated to guardians who work for the Office of the Public Advocate. Delegated guardians do not know the person well and are not involved in their life on a regular basis, other than in the role of making decisions, as required, and advocating for them.

Some of the examples in this guide step through different situations a guardian may face with their represented person and the types of things they are likely to have to consider in carrying out the role. These examples show a process of making a decision on behalf of the represented person, under the authority given to them as a guardian.

Your role as a guardian is more encompassing in terms of how involved you can be in the represented person's life and is of a more personal and hands-on nature.

2.6 I have been appointed as a joint guardian, what does this mean?

Joint guardians must agree on all of the decisions they make on behalf of the represented person. If there is disagreement between joint guardians about what is in the best interests of the represented person, you should first try to resolve the situation by seeking input from the represented person and others involved.

If joint guardians are not able to reach an agreement themselves, as a last resort, an application can be made to the Tribunal to seek directions. The Tribunal can then determine whether to give directions about the operation of the guardianship order. A guardian must comply with any direction given by the Tribunal.

Also, if the joint guardians are in conflict, cannot agree on the decisions to be made and are not acting in the best interests of the represented person, they can make an application to the Tribunal for a review of the guardianship order (see parts 2.10 and 2.11).

If a joint guardian dies, the surviving guardian can continue in the role. However, the surviving guardian should make an application to the Tribunal to review the order.

The Public Advocate (once aware of the death of the joint guardian) has a role to ensure that a review application is submitted. Where possible, it is preferable for the surviving guardian to make the review application.

2.7 I am one of two or more guardians appointed with different functions, what does this mean?

The Tribunal can appoint different guardians to perform different functions. For example, you could be appointed as guardian with the authority to make treatment decisions, and someone else could be appointed as guardian with authority to decide where the represented person lives. Each guardian is responsible for making decisions according to the authority that they have been given by the Tribunal.

If there is more than one guardian appointed with different functions you will have to communicate with each other and work together in the best interests of the represented person.

It is important to read the guardianship order as the extent of your decision-making authority will be stated clearly on the order (see part 2.1).

2.8 Can I claim expenses?

The Act does not permit guardians to receive remuneration (payment) for acting as guardian.

If you think you will incur expenses in carrying out your role, discuss this with the represented person's attorney (a person they have appointed under an enduring power of attorney to manage their finances) or administrator (a person appointed by the Tribunal to manage the represented person's finances) in advance.

In making decisions in the represented person's best interests there may be circumstances in which you incur costs. However, the reimbursement of these expenses is at the discretion of the attorney or administrator.

If you are also the represented person's attorney, you may be seen as having a conflict of interest in relation to the reimbursement of expenses. If this is an issue, it is recommended you apply to the Tribunal for directions in relation to expenses. Alternatively, you may apply for the appointment of an administrator to avoid any perceived conflict of interest (see part 4.5).

2.9 How do I sign for the represented person?

When signing documents on behalf of the represented person, sign your own name and on the line below write: 'Guardian for... [insert the represented person's name]'.

For example:

Joe Bloggs
Guardian for Rita Smith

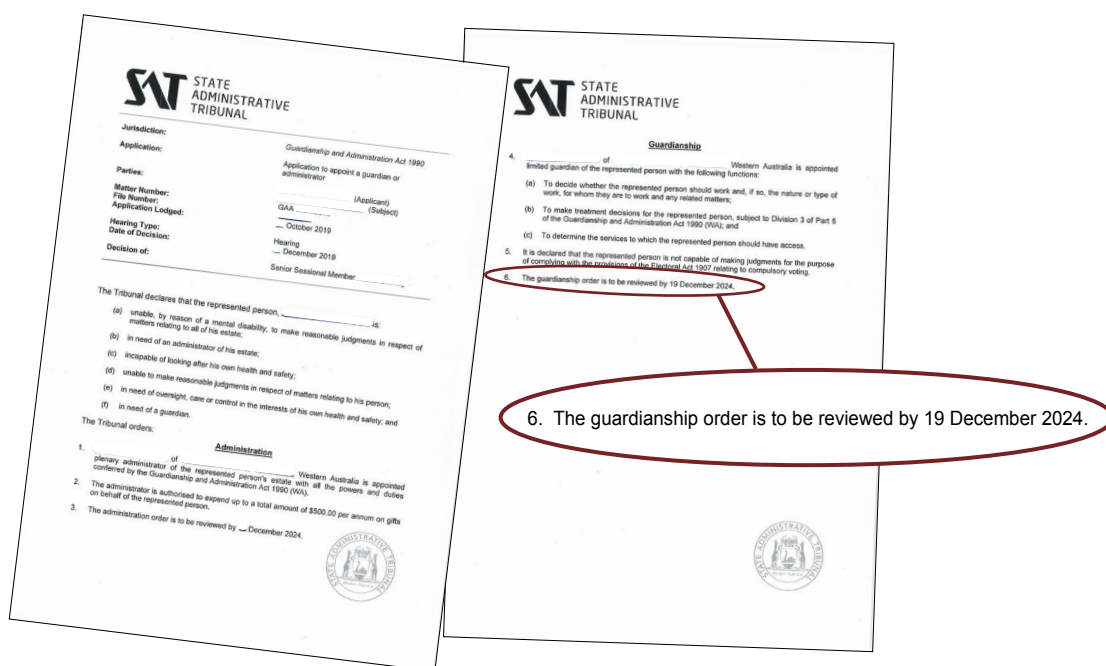
2.10 How long does a guardianship order last?

Your authority as guardian starts when the guardianship order is made and ends if the order is revoked (cancelled) by the Tribunal or the person you represent dies.

The maximum time a guardianship order can be made for, before it has to be reviewed, is five years.

When the Tribunal makes an order, it decides how long the order should be for (up to a maximum of five years). This will depend on the needs of the represented person. Some orders are made for a short time, as the Tribunal can see that the decision-making will be completed quickly or the situation of the represented person is likely to change in a short period of time and will need to be revisited. Where matters are more complex or the Tribunal can see that the person has a longer-term need for a guardian, the order will be for a longer period of time.

When you are appointed, the Tribunal will say how long they are making the order for and then a review date will be stated on the order. It is important that you are aware of the review date.



2.11 Will it ever be necessary to apply for a variation to, or review of, the guardianship order before the review date on the order?

If you, as the guardian, have been asked to make a decision on a matter that is outside your authority under the guardianship order, you can apply to the Tribunal to vary or review the terms of the order, if the matter can't be resolved informally.

The Tribunal will also review a guardianship order if, for example, the guardian dies, wishes to be discharged, or is unfit to continue as a guardian.

2.12 Who can apply to the Tribunal for a review of a guardianship order?

The Public Advocate, the Public Trustee, a represented person, a guardian or an administrator can apply to the Tribunal at any time for a review of a guardianship and/or administration order.

In addition, if any person believes that a guardian is not working in the represented person's best interests, they can seek leave (permission) from the Tribunal to apply for a review of a guardianship order.

2.13 I no longer want, or am no longer able, to continue in the role as guardian. What do I need to do?

You must apply to the Tribunal to review the guardianship order.

Until the Tribunal reviews the order, you must continue in the role as guardian for the represented person to ensure there is an authorised decision-maker for personal, lifestyle and treatment decisions.

2.14 What happens if a guardian dies?

If a sole guardian dies, the Tribunal must review the guardianship order. The Public Advocate (once aware of the death of the sole guardian) will take over the role of guardian until someone else is appointed.

As a guardian you may want to give someone you know a copy of the guardianship order and the contact details for the Office of the Public Advocate and the Tribunal. If you die or are otherwise unable to act, this person will be able to contact the Tribunal to make sure there are arrangements in place for the represented person.

If a joint guardian dies, the surviving guardian can continue in the role. However, the surviving guardian should make an application to the Tribunal to review the order (see part 2.11).

2.15 What happens at a review hearing?

At a review hearing the Tribunal will want to gather information to see if a person still needs a guardian, and if they do, whether there should be any changes to the order.

Over time, some people may need their guardian to take on more functions, as they are less able to make decisions. Alternatively, for some people the guardian may need less authority as most of the decision-making is complete. It is different for each person and the Tribunal will make a new order which is based on the current circumstances of the represented person.

In other cases, the represented person may no longer lack capacity and is, therefore, capable of making their own decisions. If a represented person has capacity, the Tribunal will revoke (cancel) the guardianship and/or administration order.

3.0 Making decisions as a guardian

3.1 Making decisions about treatment

3.1.1 What is meant by treatment?

In the *Guardianship and Administration Act 1990* (the Act), the term 'treatment' is defined as any medical, surgical or dental treatment or other health care, including a life-sustaining measure (such as assisted ventilation or cardiopulmonary resuscitation [CPR]) or palliative care.

In the Act, for the purposes of 'Part 9B – advance health directives' and 'Part 9E – medical research', 'treatment' is as defined above and includes medical research*.

A treatment decision is a decision to consent, or refuse consent, to start, stop or continue any treatment of the person.

* See the glossary for a definition of 'medical research'.

3.1.2 What is the difference between urgent and non-urgent treatment?

The Act defines urgent treatment as treatment which is urgently needed to save a person's life, prevent serious damage to their health or to prevent them suffering continued significant pain or distress.

3.1.3 When do I make treatment decisions?

In some circumstances, if you are a guardian with the authority to make treatment decisions, you will need to make these decisions when you are asked to by the represented person's treating health professional/s.

The Act contains a hierarchy in relation to treatment decisions (see Figure 1). It is essential that you are aware of this hierarchy and how it works.

3.1.4 What is the process for deciding who makes a treatment decision?

When a health professional requires consent to treat a person who doesn't have capacity, the health professional must follow a set order in seeking this consent. This order is referred to as the 'hierarchy of treatment decision-makers' (see Figure 1).

An advance health directive (AHD) is a legal document in which an adult sets out their future medical, surgical or dental treatment and other health care. This document then speaks for them if they become unable to make decisions or communicate their wishes.

If the person has made an advance health directive which contains a direction or instruction in relation to the particular treatment being considered, the health care professional must make a decision in accordance with that directive.

If the person has not made an advance health directive or it does not cover the specific circumstances or the treatment required, the health professional must seek a treatment decision from the first person on the list, who is 18 years of age or older, has full capacity and is willing and available to make the decision.

If you have been appointed as guardian with treatment authority, the health professional will seek consent from you, if you are willing and available to make a treatment decision for the represented person.

If you have been appointed as guardian, but you do not have treatment authority, you may still be the first person in the represented person's hierarchy of treatment decision-makers (for example, if you are the person's spouse) and therefore able to make treatment decisions on their behalf.

If you know the represented person has made an advance health directive you should ensure you are familiar with the decisions they have made in it and also provide copies to any treating health professional/s of the represented person.

3.1.5 How will decisions be made if treatment is not urgent?

If the represented person has made an advance health directive that covers the required treatment, the treatment will be provided or withheld according to that directive if the health professional is aware of the advance health directive.

However, if circumstances have changed since the advance health directive was made, for example, improved treatments have become available for the condition, the health professional may consult you – the guardian – about the treatment decision.

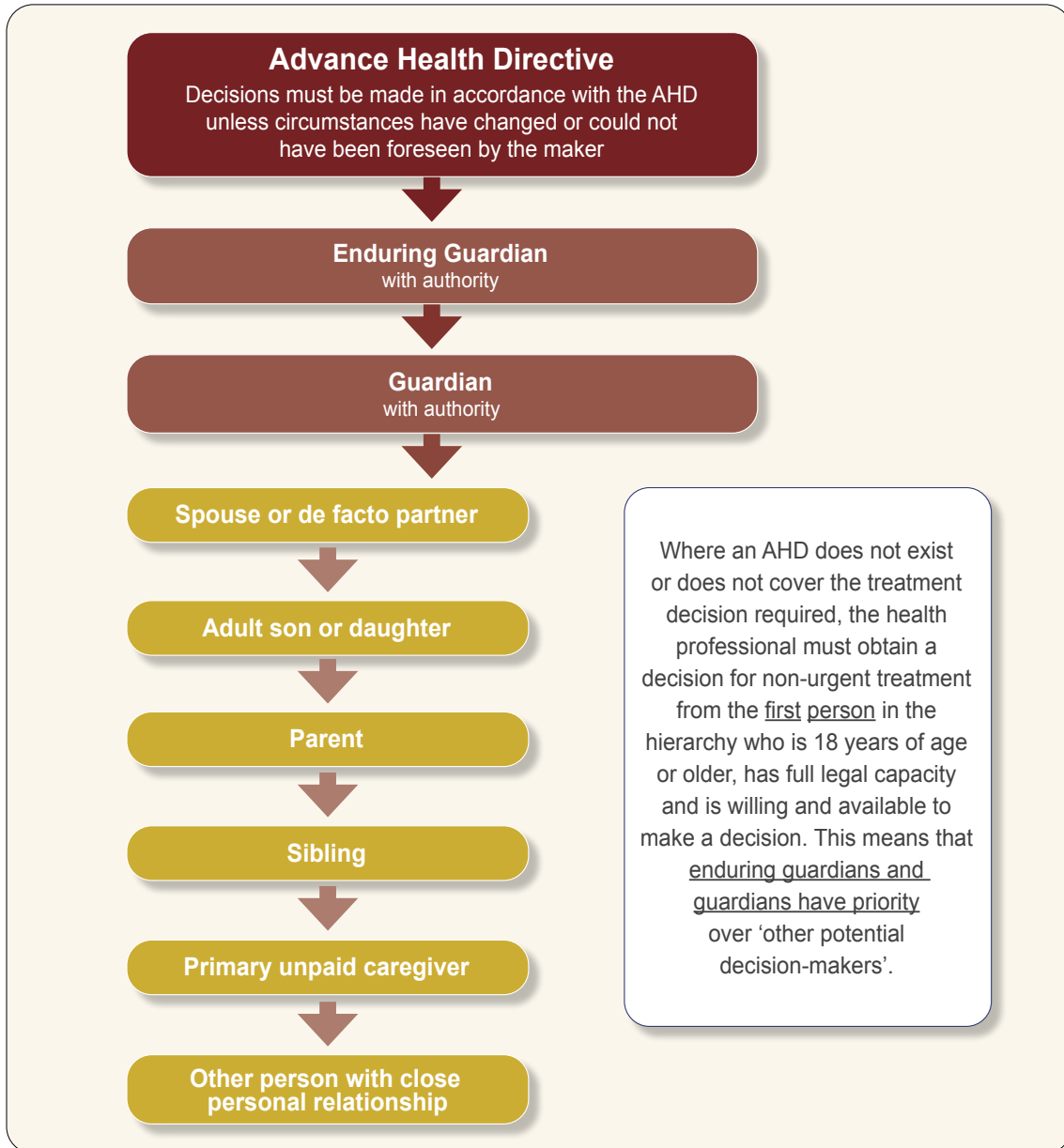
If the represented person has not made an advance health directive, or it does not cover the treatment decision required, you will be asked to make a treatment decision provided you have authority to make treatment decisions and are willing and available to make such a decision.

If treatment decisions are outside your authority under the guardianship order, you may still be asked to make a treatment decision because you are the spouse, de facto partner, adult son or daughter, parent, sibling, relative or you have a close personal relationship with the represented person (see Figure 1: Hierarchy of treatment decision-makers).

The health professional will move down to the next person on the hierarchy in order to obtain a treatment decision.

Figure 1: Hierarchy of treatment decision-makers*

This is to be read in conjunction with sections 110ZD and 110ZJ of the *Guardianship and Administration Act 1990*. Note, in the flowchart below, an advance health directive (AHD) may be in the prescribed form or a common law directive.



***Explanatory notes to Figure 1**

A health professional must consult the order above in seeking a treatment decision.

For the difference between an 'Enduring Guardian' and 'Guardian', see part 4.4.

De facto partner: "It does not matter whether (a) the persons are different sexes or the same sex; or (b) either of the persons is legally married to someone else or in another de facto relationship." *The Acts Amendment (Lesbian and Gay Law Reform) Act 2002*.

A health professional does not have to seek a treatment decision from the eldest person within any category as there is no distinction in relation to age, therefore all adult children of a person have equal priority.

A person is to be regarded as maintaining a 'close personal relationship' with the person needing the treatment if the relationship is maintained through frequent personal contact and a personal interest in the welfare of the person needing the treatment.

3.1.6 How will decisions be made if urgent treatment is needed?

If the represented person has made an advance health directive that covers the required treatment, the treatment will be provided or withheld according to that directive if the health professional is aware of the advance health directive.

If treatment is needed urgently and you, as the guardian, are not immediately available, the health professional may seek a treatment decision from another person in the hierarchy who is available.

If no one in the hierarchy is available immediately, the health professional may provide treatment to the patient.

3.1.7 How will decisions be made if the proposed treatment is as part of approved medical research?

If the represented person has made an advance health directive and the medical research is not inconsistent with the represented person's treatment decisions, the treatment will be provided or withheld according to that directive if the health professional is aware of the advance health directive.

If the represented person has not made an advance health directive, or it does not cover the treatment decision required, you will be asked to make a treatment decision provided you have specific authority to make treatment decisions in relation to approved medical research, and are willing and available to make such a decision.

If medical research treatment decisions are outside your authority under the guardianship order, you may still be asked to make a treatment decision because you are the spouse, de facto partner, adult son or daughter, parent, sibling, relative or you have a close personal relationship with the represented person (see Appendix C: Hierarchy of medical research decision-makers).

The health professional will move down to the next person on the hierarchy in order to obtain a medical research treatment decision.

The research decision-maker must seek information (known as a determination) from an independent medical practitioner that the approved medical research is in the best interests of the represented person, or not adverse to their interest (see 3.1.12).

3.1.8 How will decisions be made if the represented person comes under the *Mental Health Act 2014*?

Under the *Mental Health Act 2014* treatment means the provision of psychiatric, medical, psychological or psychosocial intervention intended (whether alone or in combination with one or more other therapeutic interventions) to alleviate or prevent the deterioration of a mental illness or a condition that is a consequence of a mental illness, and does not include bodily restraint, seclusion or sterilisation.

If the represented person for whom you are appointed guardian, is detained under the *Mental Health Act 2014* as an involuntary patient; either in hospital under an involuntary treatment order, or in the community under a Community Treatment Order, the patient (represented person) can be provided with psychiatric treatment. The treating psychiatrist can make treatment decisions, although ideally the treating psychiatrist would keep you informed and discuss the treatment plan with you as the represented person's guardian.

If at any time, the represented person is a voluntary patient under the *Mental Health Act 2014*, they can make their own decisions about their psychiatric treatment, despite the guardianship order, if the psychiatrist determines they have the capacity to do so. If they are shown not to have capacity to make these decisions, you would be asked to provide informed consent to the provision of treatment.

If at any time, the represented person is a voluntary or involuntary patient under the *Mental Health Act 2014* and has a physical condition which requires treatment (not a psychiatric condition), you will be asked to make these treatment decisions.

3.1.9 How will decisions be made if the represented person is at the end stages of their life?

Good end-of-life planning will avoid unnecessary interventions and hospital admissions and enable the person to die with dignity and, where possible, in the company of family and friends and in circumstances consistent with the person's wishes.

This planning should start as soon as the represented person is diagnosed with a life-limiting illness, or if their death is expected.

If the represented person made an advance health directive, you should be familiar with the document and make it available to health professionals and to the aged-care or treating facility.

You may have a reasonable idea of the represented person's end-of-life views and wishes, or, if you don't, you should attempt to gather these from the represented person. If they are unable to express their wishes, you should look at their previous actions and speak with other family members and friends.

You will also need to speak with the represented person's medical practitioner to get information about:

- the nature of their condition
- the prognosis (likely outcome)
- possible treatment options
- whether stopping treatment is a consideration
- the benefits and risks of treatment
- alternative treatment options
- their medical view on resuscitation
- their recommended treatment option/s and the reason for the recommendations.

When you reach a decision you should keep family members and friends informed. You will also need to continue to consult with medical practitioners as the represented person's situation may change and further decisions may be required (see part 3.1.13).

When the *Voluntary Assisted Dying Act 2019* is operational in Western Australia, a guardian will not be able to make a decision for a represented person under the *Voluntary Assisted Dying Act 2019*, as a patient must have decision-making capacity to make a voluntary assisted dying decision.

Nothing in the *Guardianship and Administration Act 1990* authorises the making of a treatment decision, whether in an advance health directive or otherwise, in relation to voluntary assisted dying decisions.

3.1.10 What steps should I follow when making treatment decisions?

Making treatment decisions can be difficult especially if you have been given a choice of treatment options. To assist in future decision-making there are some ways you can prepare.

When you are appointed as guardian take the time to familiarise yourself with the represented person's general health and any diagnosed conditions, particularly any conditions about which you might be required to make a treatment decision.

To assist you in making treatment decisions you could:

- talk to the represented person, their general practitioner (GP) and other health professionals
- ask the represented person's GP about any health checks they might need and how often these should occur
- meet the treating doctor to discuss the diagnosis, the treatment options, the risks and benefits associated with each treatment option, the prognosis of each option, the outcome of no treatment, and ascertain their recommendation
- consider seeking a second opinion before making any major decisions
- if you have the authority to make medical research decisions, seek written information (known as a determination) from an independent medical practitioner before making any research decisions (see part 3.1.12)
- discuss treatment options with other family members
- make decisions only when you are confident you have all the information necessary to make a decision in the represented person's best interests.

You should provide the GP and any other health professionals with your contact details so you can be reached easily if decisions need to be made.

3.1.11 How should I inform health professionals of my decisions?

If you are present at a medical appointment you can make the treatment decision in person and the health professional can give you the required forms to sign.

If you cannot attend a medical appointment you will need to discuss with the health professional how you should provide your decision. You might be able to give your decision over the phone or send any required forms by email or fax.

3.1.12 How do I record treatment decisions?

The Public Advocate recommends you keep details of any treatment decisions you make, including the basis on which each decision was reached.

For example, if you make a treatment decision you could note:

- the decision (whether consent was given for treatment and, if so, which treatment was chosen)
- the date the decision was made
- the names of any health professionals or other people you consulted in the process
- the treatment options available for the specific condition
- the main reasons for making that decision.

If you have been appointed by the Tribunal with specific authority to make treatment decisions about the represented person's participation in approved medical research, and you have been asked to make such a decision, you need additional information before making a decision to consent, or refuse consent, to the treatment.

You must seek information (known as a determination) from an independent medical practitioner that the approved medical research is in the best interests of the represented person, or not adverse to their interest. The independent medical practitioner must provide you with existing treatment options, and advise if the proposed medical research treatments involve substantial risk to the represented person greater than if they did not participate in the research. The independent medical practitioner's determination must be provided in writing.

For more information see Appendix C: Hierarchy of medical research decision-makers, and refer to the Position Statement: Decisions about medical research available on the Office of the Public Advocate's website: www.publicadvocate.wa.gov.au

These records can be important if decisions are ever questioned, or if another party with an interest in the matter makes an application to the Tribunal.

At the back of this guide you will find some notes pages which you may want to print so that you can record your decisions (see Appendix A).

3.1.13 Examples of the decision-making process you may follow to make treatment decisions

Routine health care decision:

| | |
|--|--|
| Issue | Recommendation that the represented person has a flu vaccination. |
| Function | Medical/treatment. |
| Decision to be made | Consent to flu vaccination or not. |
| Consultation with the represented person (if possible) | Does the represented person usually have the flu vaccination? Have they ever had a reaction? |
| Consultation with others (medical professionals, service providers, family) | Discuss the risks and benefits with the represented person's general practitioner (GP). |
| Decision made by the guardian | If there are no contraindications, you would likely consent to flu vaccination. You may be asked to sign a consent form prior to the GP appointment for the vaccination. |

End-of-life care decision:

| | |
|--|---|
| Issue | Doctor has advised that the represented person, who is elderly with a number of life-limiting conditions, has a chest infection/pneumonia and in the doctor's view, it is a life-threatening event. |
| Function | Medical/treatment. |
| Decision to be made | Continue active forms of treatment (such as antibiotics) or discontinue and provide only palliative/comfort care measures. |
| Consultation with the represented person (if possible) | Represented person is unable to express their wishes. |
| Consultation with others (medical professionals, service providers, family) | <p>Medical professionals are recommending that antibiotics cease, continue medication for pain and agitation and discharge from hospital so the represented person can return to the familiar and comfortable surroundings of their facility.</p> <p>Consultation with other family members reveals a general consensus that while the represented person had been socially active in recent years, a recent stroke has severely limited her mobility, and a number of other medical conditions have worsened and her quality of life has decreased dramatically.</p> |
| Decision made by the guardian | Guardian consents to withdrawal of antibiotics and continuation of medication for pain and agitation. |

3.2 Making decisions about personal and lifestyle matters

3.2.1 What is meant by personal and lifestyle matters?

Personal and lifestyle matters include where a person lives, who they live with, the type of support services they receive, who they have contact with and any employment, training and education they are engaged in.

3.2.2 Who can make decisions about personal and lifestyle matters?

As a guardian, you would be asked to make personal and lifestyle decisions, assuming you have been appointed with the appropriate authority.

The first thing you need to do before making a decision is to confirm that the guardianship order gives you the authority required.

If you have been appointed as a plenary guardian, you have authority to make decisions about **all** personal and lifestyle matters (see part 2.1).

If you have been appointed as a limited guardian, you will need to look at the order to see what authority you have been given.

If, for example, you need to make a decision about where the represented person lives (an accommodation decision) you will need to have been given the following authority in the order:

“Decide where the represented person is to live, whether permanently or temporarily.”

In regard to accommodation, the order may also give you the following authority:

“Decide with whom the represented person is to live.”

If you are a limited guardian and you need to make a decision about the services your represented person receives, you will need to have been given the following authority in the order:

“Determine the services to which the represented person should have access.”

Similarly, for training and education decisions, the order will state:

“Decide what education and training the represented person is to receive.”

For employment decisions the order will state:

“To decide whether the represented person should work and, if so, the nature or type of work, for whom the represented person is to work and related matters.”

For contact decisions (if there are issues with the represented person associating with certain people in their life), the order will state:

“To determine what contact, if any, the represented person should have with others and the extent of that contact.”

If you have not been appointed with authority to make a decision regarding a certain personal or lifestyle-related area of the represented person's life, there is no other guardian appointed to make the decision, and a decision is required, you may be able to make this decision in an informal way. The steps you take to make this decision will be the same as if you were authorised, but you will not be making this decision under the authority of the guardianship order.

If however, issues arise with you making this decision in an informal way, you may need to make an application to the Tribunal to have this authority added to your guardianship order, or have someone else appointed as guardian with the relevant decision-making authority (see part 2.10).

3.2.3 What information should I gather before making a personal or lifestyle decision?

As a guardian you should familiarise yourself with all the agencies, and their roles, that support the represented person and their current lifestyle. These might include support workers, home help, meals on wheels, and nursing agencies. These agencies might be able to provide you with information that will assist you in making decisions.

A home support agency for example, might be able to provide you with information and advice on:

- the represented person's current support requirements
- whether additional support is available
- ways to minimise risks in the home.

You might want to seek an assessment and then consult with key parties before making a decision. For example, before agreeing to the represented person being moved into new accommodation you might seek a professional assessment about whether the person could access the required support to remain in their current home.

3.2.4 What is meant by available and willing?

It is not always possible to anticipate when decisions will need to be made but, if you have accepted an appointment as a guardian, you should be available to make the types of decisions listed in the order. It is important that you provide your contact details to relevant health and other professionals.

Often you will be aware of pending decisions and can plan for these. For example, if the represented person needs to move into care or requires more home support services, you can arrange to be available when needed. Similarly, non-urgent treatment can usually be scheduled for a time when you will be available to make treatment decisions.

If you are going to be unavailable for a specific period, for example while on holiday, you should leave your contact details with relevant parties so you can be contacted if a decision is needed.

3.2.5 How should I record the personal and lifestyle decisions I have made?

The Public Advocate recommends that you keep details of any personal and lifestyle decisions you make, including how you came to make each decision, in the same way that you record treatment decisions (see part 3.1.12).

For example, if you make a decision about where the represented person should live, you could note:

- the decision (which facility was chosen for the person)
- the date the decision was made
- the names of any service providers, health professionals or other persons you consulted in the process
- the main reasons for making that decision.

These records can be important if decisions are ever questioned or if another party with an interest in the matter makes an application to the Tribunal.

3.2.6 Where can I get advice to assist with making decisions?

The Office of the Public Advocate’s telephone advisory service (1300 858 455) operates weekdays between 9am and 4.30pm and can provide you with information and advice. The advisory officer cannot make a decision for you but can guide you on the issues you might consider in reaching a decision.

3.2.7 Example of the decision-making process you may follow to make personal and lifestyle decisions

Making an accommodation decision:

| | |
|--|--|
| Issue | Represented person is in hospital following a fall at home. |
| Functions | Accommodation and services: the guardian has authority to decide where the represented person will live and what services the represented person will access. |
| Decision to be made | Should the represented person go back home when they are well enough to be discharged from hospital, or go into a care facility? |
| Consultation with the represented person (if possible) | What are their views and wishes? Discuss what services could be engaged to assist them at home. Have they fallen before or is this the first incident? |
| Consultation with others (medical professionals, service providers, family) | What does the treating team recommend? Is transitional care an option? Could you trial a return to home? What are the views of other family members and are they in agreement? The represented person feels strongly about returning home but the family is worried that they will fall again or have other difficulties. The treating team is agreeable to trial a return to home with increased services. |
| Decision made by the guardian | The guardian consents to trial a return to home with increased services. Situation to be reviewed after four weeks. |

4.0 General information

4.1 Who can advise on whether an application to the State Administrative Tribunal would be appropriate?

An advisory officer from the Office of the Public Advocate's telephone advisory service (1300 858 455) can advise on whether there might be a need to make an application to the State Administrative Tribunal (see part 1.3).

4.2 How do I contact the Office of the Public Advocate?

If you believe that a person is in need of a guardian or administrator, or that an appointed guardian is not acting in the best interests of a represented person, you should contact the Office of the Public Advocate's telephone advisory service on 1300 858 455 to discuss your concerns.

Office of the Public Advocate

PO Box 6293, East Perth WA 6892

Internet: www.publicadvocate.wa.gov.au

Email: opa@justice.wa.gov.au

Telephone: 1300 858 455

4.3 How do I contact the State Administrative Tribunal?

The State Administrative Tribunal (the Tribunal) is an independent statutory body, whose functions and powers are established by the *State Administrative Tribunal Act 2004*. The Tribunal makes and reviews a range of administrative decisions, including those in relation to guardianship and administration matters and other areas of human rights concerning vulnerable people in the community.

More information about the role and functions of the Tribunal is available from the Tribunal's website: www.sat.justice.wa.gov.au

Between 8.30am-4.30pm Monday to Friday, you can:

- call the Tribunal's contact centre on 9219 3111, or
- visit the Tribunal's registry at Level 6, 565 Hay Street, Perth, WA.

You can also send an email to: sat@justice.wa.gov.au

Tribunal staff can provide you with information on procedural enquiries.

4.4 What is the difference between a guardian and an enduring guardian?

| Guardian | Enduring Guardian |
|---|---|
| Appointed by the State Administrative Tribunal for a person who has already lost the capacity to make their own decisions. | Chosen by an adult with full legal capacity (the appointor) to make decisions on their behalf in the future (in the event that they lose capacity). |
| The scope of the decision-making authority is determined by the State Administrative Tribunal when the appointment is made. | The scope of the decision-making authority is determined by the appointor when making their enduring power of guardianship . |
| Operates under a guardianship order, made by the State Administrative Tribunal. | Operates under an enduring power of guardianship, made by the appointor. |

4.5 Will it ever be necessary to apply for an administration order?

A guardian has no authority to make decisions about the represented person's property and/or finances (their estate).

A person appointed by the Tribunal who is given legal authority to make decisions about property and finances in the best interests of an adult with a decision-making disability is called an administrator. The same person can be appointed by the State Administrative Tribunal as both the guardian and the administrator for a represented person.

If you, as a guardian, are being asked to make decisions about the represented person's property and finances, and there is no attorney or administrator appointed, it may be necessary to apply for an administration order (see part 1.3).

4.6 I would like to appoint my own substitute decision-makers while I still have full legal capacity. Can I do this?

Yes. You can make an enduring power of guardianship, a legal document, to appoint a person of your choice to make important personal, lifestyle, treatment and medical research decisions on your behalf should you ever become incapable of making these decisions for yourself.

You can also make an enduring power of attorney, a legal document, to appoint an attorney to make decisions about your property and finances.

More information about these documents can be found on the Office of the Public Advocate's website: www.publicadvocate.wa.gov.au

If you want to make an advance health directive, a legal document in which you make decisions about your future medical treatment including life-sustaining measures and palliative care, see the Department of Health's website for more information: www.health.wa.gov.au/advancecareplanning

5.0 Appendices

Appendix A: Notes template for recording decisions

Guardian's Name: _____
Guardian's Name (if joint guardians): _____
Represented Person's Name: _____
Date: _____

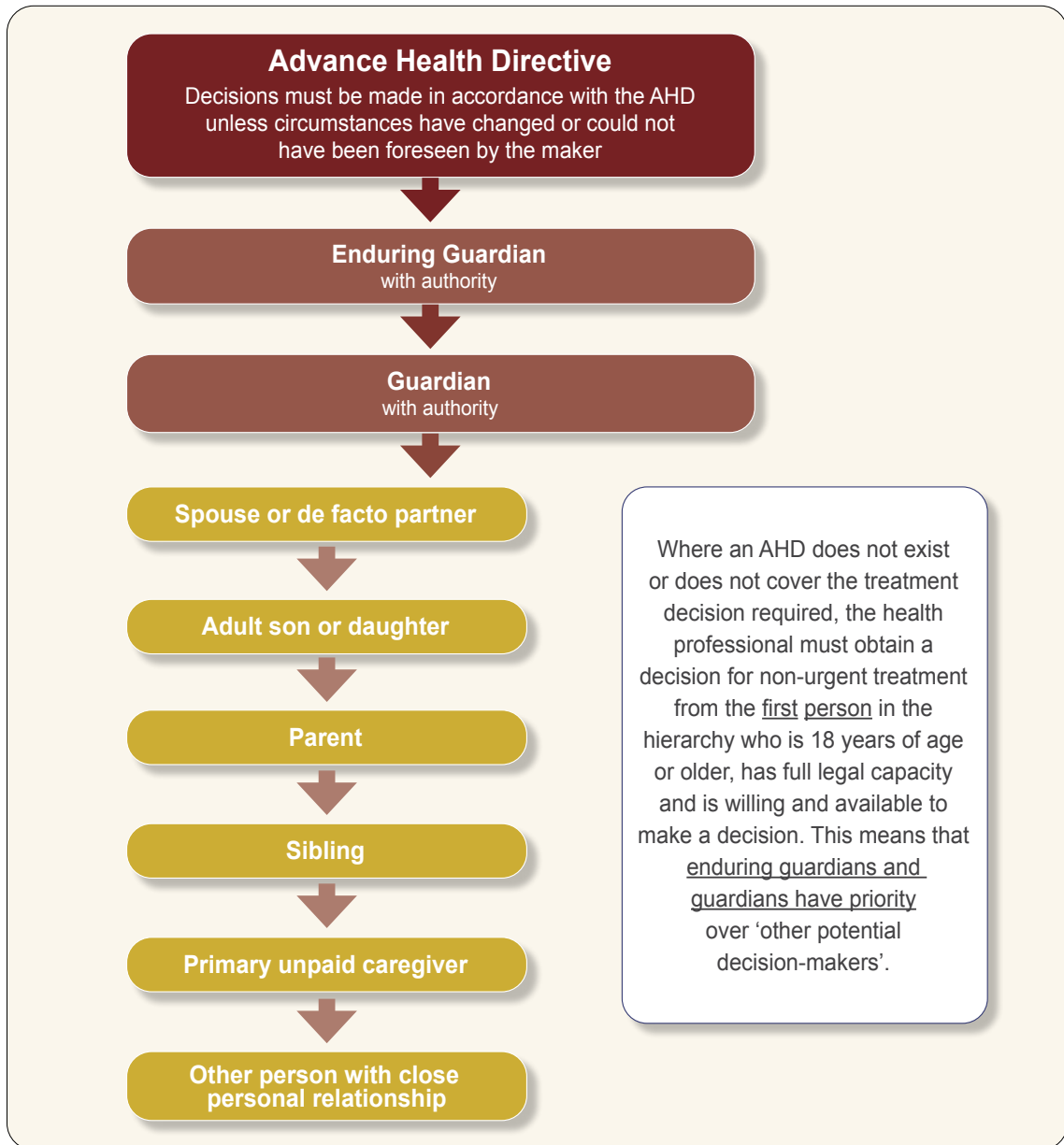
| | |
|--------------------------|---|
| Decision required | _____ _____ _____ _____ _____ |
| Options | _____ |
| People consulted | _____ _____ _____ _____ |

APPENDICES

| | |
|---|---|
| Information/ views from people consulted | <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> |
| Decision | <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> |
| Reasoning | <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> |
| Additional information | <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> |

Appendix B: Hierarchy of treatment decision-makers*

This is to be read in conjunction with sections 110ZD and 110ZJ of the *Guardianship and Administration Act 1990*. Note, in the flowchart below, an advance health directive (AHD) may be in the prescribed form or a common law directive.



*Explanatory notes

A health professional must consult the order above in seeking a treatment decision.

For the difference between an 'Enduring Guardian' and 'Guardian', see part 4.4.

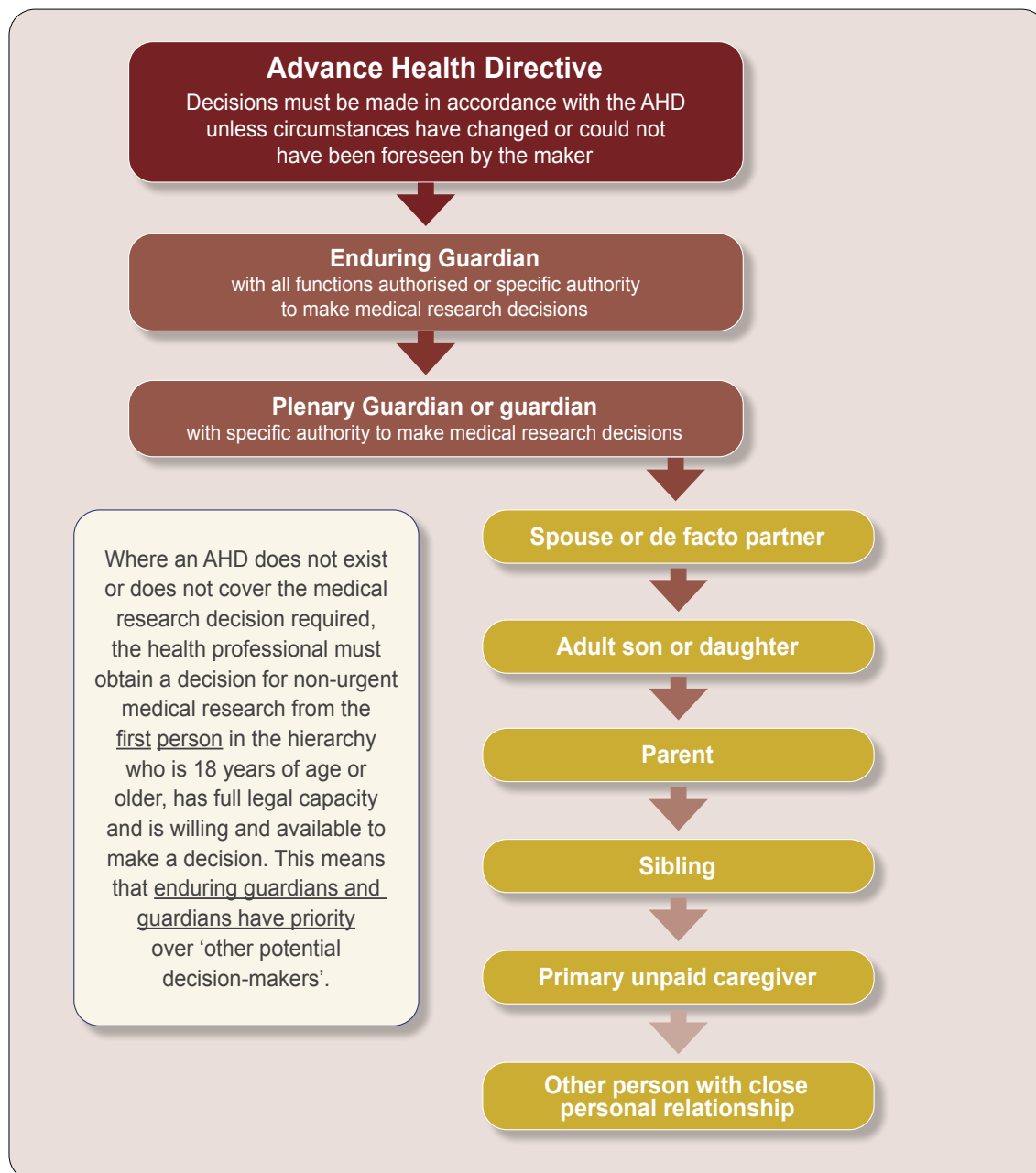
De facto partner: "It does not matter whether (a) the persons are different sexes or the same sex; or (b) either of the persons is legally married to someone else or in another de facto relationship." *The Acts Amendment (Lesbian and Gay Law Reform) Act 2002*.

A health professional does not have to seek a treatment decision from the eldest person within any category as there is no distinction in relation to age, therefore all adult children of a person have equal priority.

A person is to be regarded as maintaining a 'close personal relationship' with the person needing the treatment if the relationship is maintained through frequent personal contact and a personal interest in the welfare of the person needing the treatment.

Appendix C: Hierarchy of medical research decision-makers

This is to be read in conjunction with sections 110ZP and 110ZQ of the *Guardianship and Administration Act 1990*. Note, in the flowchart below, an advance health directive (AHD) may be in the prescribed form or a common law directive.



The research decision-maker must seek information (known as a determination) from an independent medical practitioner that the approved medical research is in the best interests of the represented person, or not adverse to their interest. The independent medical practitioner must provide the research decision-maker with existing treatment options, and advise if the proposed medical research treatments involve substantial risk to the represented person greater than if they did not participate in the research. The independent medical practitioner's determination must be provided in writing.

For more information refer to the Position Statement: Decisions about medical research available on the Office of the Public Advocate's website: www.publicadvocate.wa.gov.au

Appendix D: Glossary of terms used in this guide

Administrator: A person appointed by the State Administrative Tribunal who is given legal authority to make decisions about property and finances in the best interests of a person with a decision-making disability.

Advance Health Directive (AHD): A legal document in which an adult with full legal capacity sets out their future medical, surgical or dental treatment and other health care. This document then speaks for them if they become unable to make decisions or communicate their wishes.

Attorney: A person or organisation appointed under an enduring power of attorney by an adult with full legal capacity to make property and financial decisions on their behalf.

Best interests: The guardian is required to act in the represented person's best interests. The term 'best interests' is addressed in section 51 of the *Guardianship and Administration Act 1990* (see part 2.3).

Capacity: Refers to whether a person is able to fully understand the decisions they need to make and the potential outcome of making those decisions. See also 'full legal capacity'.

Decision-making disability: A general term used to describe someone who has a disability which affects their ability to understand information and to make informed and reasonable decisions. A person may have a decision-making disability as a result of:

- intellectual disability (usually from birth, for example Down syndrome or foetal alcohol syndrome)
 - mental illness (such as depression or schizophrenia)
 - acquired brain injury (such as from a fall or car accident)
 - substance related brain damage (a result of using too many drugs or drinking too much alcohol)
 - dementia (a disease of the brain).
-

Enduring Guardian: A person appointed under an enduring power of guardianship (prior to the appointor losing capacity) to make personal, lifestyle, treatment and medical research decisions on behalf of the appointor.

Enduring Power of Attorney (EPA): A legal document in which an adult with full legal capacity nominates someone to make decisions about finances and property. The person appointed is called an attorney.

Enduring Power of Guardianship (EPG): A legal document in which an adult with full legal capacity nominates someone to make personal, lifestyle, treatment and medical research decisions on their behalf if they lose capacity. The person appointed is called an enduring guardian.

Full legal capacity: The capacity to make a formal agreement and to understand the implications of statements contained in that agreement.

Guardian: A person appointed by the State Administrative Tribunal who is given legal authority to make personal, lifestyle, treatment and medical research decisions in the best interests of an adult with a decision-making disability.

Medical research: Research approved by a Human Research Ethics Committee which is conducted with or about individuals, or their data or tissue, in the field of medicine or health, and includes an activity undertaken for the purpose of that research. Medical research does not include research which only analyses data and which does not result in the disclosure or publication of personal information.

Presiding member: The sitting member of the State Administrative Tribunal who:

- alone constitutes the Tribunal for dealing with the matter concerned, or
- presides at a proceeding of the Tribunal for dealing with the matter concerned.

Represented person: A person with a decision-making disability for whom the State Administrative Tribunal has made an order appointing a guardian and/or administrator.

State Administrative Tribunal (the Tribunal): The State Administrative Tribunal is an independent statutory body responsible for appointing a guardian and/or administrator who must make decisions in the best interests of a person with a decision-making disability.

Treatment: Any medical, surgical or dental treatment or other health care, including a life-sustaining measure or palliative care.

In the Act, for the purposes of 'Part 9B – Advance health directives' and 'Part 9E – medical research', treatment is as defined above and includes medical research.

Treatment decision: A decision to consent or refuse consent, to the commencement or continuation of any treatment of the person.

In Part 9B of the Act, relating to Advance Health Directives, the definition of treatment decision is expanded to include participation in medical research.

For alternative formats of this guide, contact the Office of the Public Advocate.





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