

# Guidelines for Witnessing Enduring Documents

## Key Points

**Witnesses must satisfy themselves that the principal understands the nature and effect of:**

- the document they are signing
- the delegation of their decision making powers and directions given about future health care.

**When taking instructions, witnesses should:**

- ask open-ended questions
- take notes, detailing their interview with the principal
- refer the principal to a health care professional if you have doubts about their capacity to understand the document.

**Do not witness an enduring document if you have concerns that:**

- the principal lacks capacity to understand what they are signing or
- the principal is being unduly influenced by another person to sign the document.

## Purpose of these guidelines

In an Enduring Power of Attorney, a person ('the principal') delegates to another person the power to make personal and/or financial decisions on his/her behalf. By an Advance Health Directive, the principal may give directions about health matters and special health matters, for his or her future health care. Assessing the principal's capacity to understand the nature and likely effects of delegating powers and giving future directions is one of the most important things that a lawyer, Justice of the Peace or Commissioner for Declarations, as a witness to the document, can do.

However an assessment of capacity, by a witness, can be difficult. At times it may give rise to significant personal and professional pressure because the choices made in these circumstances may have to be defended in the future.



## Contact Us

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A witness to the execution of an enduring document has a statutory duty to certify that the principal appeared to have the capacity necessary to make the document (Section 44(4) *Powers of Attorney Act 1998*).

Failing to perform this duty competently could have serious ramifications, not only for you, as the witness, but for the principal. These guidelines will help you to carry out this important statutory duty by:

- highlighting the indicators that may suggest you need to carefully consider a person's capacity
- providing a framework within which to consider the person's capacity
- assisting you to determine if you need to refer the person to more specialised assessment.

These guidelines are not meant to be a substitute for a proper or more rigorous assessment of a person's capacity (where that is justified).

## Statutory definition

**The *Powers of Attorney Act 1998* [Schedule 3] defines 'capacity' for an adult for a matter, as meaning 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

**Section 41 of the *Powers of Attorney Act 1998* addresses a principal's capacity to make an Enduring Power of Attorney. Section 41 states:**

(1) A principal may make an enduring power of attorney only if the principal understands the nature and effect of the Enduring Power of Attorney.

(2) Understanding the nature and effect of the Enduring Power of Attorney includes understanding the following matters:

(a) the principal may, in the Power of Attorney, specify or limit the power to be given to an attorney and instruct an attorney about the exercise of the power;

(b) when the power begins;

(c) once the power for a matter begins, the attorney has power to make, and will have full control over, the matter subject to terms or information about exercising the power included in the Enduring Power of Attorney;

(d) the principal may revoke the Enduring Power of Attorney at any time the principal is capable of making an enduring power of attorney giving the same power;

(e) the power the principal has given continues even if the principal becomes a person who has impaired capacity;

(f) at any time the principal is not capable of revoking the Enduring Power of Attorney, the principal is unable to effectively oversee the use of the power.

It should be noted by witnesses that section 47(1) requires the same requisite capacity to revoke an Enduring Power of Attorney as is required to make an Enduring Power of Attorney.

**Section 42 of the *Powers of Attorney Act 1998* addresses a principal's capacity to make an Advance Health Directive. Section 42 states:**

(1) A principal may make an Advance Health Directive, to the extent it does not give power to an attorney, only if the principal understands the following matters -

(a) the nature and the likely effects of each direction in the Advance Health Directive;

(b) a direction operates only while the principal has impaired capacity for the matter covered by the direction;

(c) the principal may revoke a direction at any time the principal has capacity for the matter covered by the direction;

(d) at any time the principal is not capable of revoking a direction, the principal is unable to effectively oversee the implementation of the direction.

## **Suggested process to satisfy yourself of the principal's capacity to understand the document**

### **Initial contact**

As a witness of an enduring document, be aware that, from the first contact with the principal, you will be able to gather information that is relevant to the principal's capacity to understand the document.

Where you know or reasonably consider that the person has a diagnosed condition that may affect his/her decision-making capacity (such as an intellectual or psychiatric disability, acquired brain injury or dementia), take extra care in witnessing the document, or seek a medical opinion verifying the person's capacity.

It is recommended that you meet with the principal alone. This is an opportunity to develop rapport with the principal and to establish the context within which the principal has decided to make the enduring document (for instance, the death of a partner or a serious illness). It is also an opportunity to determine if the person is being influenced into making the enduring document.

During this initial contact, it is reasonable to discuss background, family, health problems or related issues (such as medication that may affect cognitive function, and, in the case of an EPA, the principal's broad financial circumstances including assets, source of income, payment of household and other accounts).

If you are concerned about the principal's cognitive ability, refer the principal to a health care professional to obtain an assessment of their capacity to understand the nature and effect of the enduring document they wish to make. A witness should not rely solely on such a medical report, and must ask additional questions to satisfy themselves of the principal's capacity. You should never witness an enduring document if you doubt the principal's capacity to understand the document.

### **Indicators of impaired capacity**

When you meet the principal, you may see a range of behaviours that indicate impaired capacity. Some early symptoms, particularly in the area of dementia, may mean the person is:

- more forgetful of recent events
- more likely to repeat themselves
- less able to grasp new ideas
- more anxious about having to make decisions
- more irritable or upset if they cannot manage a task
- easily influenced by others about their decision making
- less concerned with activities of other people
- less able to adapt to change
- often losing things or getting lost
- undergoing change in behaviour, and/or
- experiencing change in personality.

People with an intellectual or psychiatric disability may respond differently, and require further questioning to assess their ability to understand an enduring document.

### **Interview process**

Your role as witness in the making of an enduring document is an essential safeguard for people with impaired capacity. An interview is your primary tool in assessing if the principal has the capacity to understand the document.

Always seek an opportunity to meet with the principal alone. Record the questions you ask and the principal's responses.

Preferably, ask the principal to read the enduring document before you attempt to explain it. The document contains a detailed introductory explanation. For vision-impaired people, consider reading the explanatory part of the document first.

When interviewing a principal intending to make an Enduring Power of Attorney, keep your questions 'open ended', not closed. For example, this question requires a yes/no response, which may be inadequate in determining capacity:

*"You understand what an Enduring Power of Attorney is, don't you?"*

### **These questions allow more expansive responses:**

- What is an Enduring Power of Attorney?
- Why do you want an Enduring Power of Attorney?
- What sort of decisions will your attorney be making for you?
- Can you limit the attorney's powers if you want to?
- Are you able to give specific instructions to your attorney about decisions to be made?
- What is the extent of the assets over which the attorney will have control?
- How many attorneys can you have?
- Why have you selected this person to be your attorney?
- If you have more than one attorney, who will make decisions concerning you or your finances?
- When will the attorney's power for financial matters begin?
- When will the attorney's power for personal matters begin?
- How long does the attorney's power last?
- Can you change or revoke the Enduring Power of Attorney?
- Is there anything else that will end the attorney's power?
- What would you do if you didn't agree with the attorney's decision?

If the principal cannot answer questions such as these, explain the correct responses, then ask the questions again later in the conversation. For example:

*"Do you recall that I explained what an Enduring Power of Attorney is? Could you tell me what that explanation was?"*

### **When you explain a financial Enduring Power of Attorney, cover the following:**

- that the principal is appointing someone to act on his/her behalf
- that the attorney will be able to assume authority to the extent indicated over the principal's financial affairs (such as selling his/her house)
- that the authority for the attorney begins once the document is completed (unless otherwise specified)
- that the attorney will be able to do anything with the principal's personal property (money etc.) and real property (real estate) that the principal could do
- that the authority will continue should the principal have impaired capacity, and
- that if the principal should lose capacity, the power will be irrevocable.

## When interviewing a principal intending to make an Advance Health Directive, you should ask questions such as:

- has your doctor explained any medical terms or other words that you are unclear about? (identify a medical term in the document and ask the principal what it means)
- have you discussed your decisions with family members or close friends?, if yes, ask what did they say?
- what you would want your medical treatment to achieve if you become ill?
- If treatment could prolong your life, what level of quality of life would be acceptable to you?
- how important is it to you to be able to communicate with family and friends?

## When you explain an Advance Health Directive, cover the following matters:

- that the principal may make an Advance Health Directive, to the extent it does not give power to an attorney
- that a direction operates only while the principal has impaired capacity for the matter covered by the direction
- that the principal may revoke a direction at any time the principal has capacity for the matter covered by the direction
- that at any time the principal is not capable of revoking a direction, the principal is unable to effectively oversee the implementation of the direction.

Where a principal is making an Advance Health Directive, it is strongly recommended that they discuss it with their general practitioner or a specialist medical practitioner who knows their medical history and views.

If the principal has problems answering the questions after you have explained, it is advisable that you suggest that a professional opinion be sought about the principal's capacity to make an enduring document. This could be obtained from an appropriately qualified medical practitioner or another professional with expertise in cognitive assessment, e.g. neuropsychologist.

A medical assessment gives you additional information about the principal's capacity to understand the document. However, the decision about whether the principal has capacity to execute the enduring document remains with you, as the witness.

Be cautious if you observe behaviour or have interactions with the principal that are inconsistent with the information contained in the medical assessment.

## Note taking

When assessing capacity to understand an enduring document, be prepared for any challenges to your assessment of the principal. It is good practice to make a written record of all the steps you have taken in assessing capacity (including all questions and answers).

Also record other witnesses' opinions about the principal's capacity or lack of capacity to understand an enduring document. It is important to record basic information such as the date, time of the interview, who was present, the length of the interview and the location.

## Concerns

Making an enduring document is a significant matter. The principal should consider seeking professional advice from his/her solicitor, the Public Trustee or a trustee company before signing this document.

If you suspect that a person is abusing or exploiting someone who is about to become the principal, or is currently the principal, to an Enduring Power of Attorney, you can contact the Investigations Team at the Office of the Public Guardian to discuss your concerns.

## Contact Details

### Office of the Public Guardian

Phone: 1300 653 187

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### Other contacts

The Public Trustee

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Endnote:

*See Darzins, Dr P, Molloy, Dr W & Strang, Dr D (Eds) (2000) Who Can Decide: The six step capacity assessment process. Memory Australia Press: Adelaide.*

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