

Supported and Substitute Decision-making in Delaware

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Why prepare to help others with making decisions?

- In our lives, there most likely will come a point when someone we love needs our help to make decisions, such as where to live, what to spend money on, or what medical treatments are the best choice.
- For example, we may help our children with these decisions, and that help may need to continue after they reach 18, and are viewed as an adult.
- In other cases, a relative or loved one may experience a medical emergency that interferes with their *ability to make decisions* or manage their finances, and they need someone to step into that role, whether on a temporary basis or a permanent one.
- In addition, as we *age*, our *ability to make decisions* may diminish.

What is decision making capacity?

- The world is structured around daily decisions, and our ability to give informed consent and contract, understanding the facts or the nature and intent of the document is an essential daily living skill.
- “Capacity” is a measure of our ability to engage in the choices and challenges presented by this world.
- Specifically, capacity is an individual’s ability to understand, appreciate and manipulate information to form rational decisions. A “rational” decision is not one you may agree with, but IS one that flows naturally from the choices presented. (Think of the concept of “assent” vs. “consent”)
- Capacity is assessed by a physician and “decision making capacity” refers to a physician’s assessment of a person’s psychological abilities to form rational decisions. *That assessment flows into the legal concept of “competency”. Competency is ultimately determined by the legal decision of a Court with jurisdiction over the subject.*

An individual is presumed to have capacity and be capable of managing their affairs and to have capacity unless adjudicated otherwise by a Court of *competent* jurisdiction.

When should I offer help or step in?

- Consider if the individual can meet some or all of the following needs for themselves:
 - Money Management, including managing accounts, assets, benefits, and recognizing exploitation.
 - Health Care, including making decisions, understanding the nature and consequences of the decision, taking medications, maintaining hygiene and diet, and avoiding high-risk behaviors.
 - Managing personal relationships, and behaving appropriately with friends, family, and workers, and making safe decisions about sexual relationships.
 - Assess whether they are living independently, and maintaining habitable living space.

No impairment of Capacity	Some impairment of Capacity	Significant impairment of capacity	Lacks decision-making capacity
<p>No restriction on decision making</p> <p>Understands the nature and intent of documents and can execute documents, such as AHCD, POA, Will, Contract.</p> <p>Understands both simple and complex fact presentations and is able to process information</p> <p>Can make decisions with or without assistance</p> <p>May seek assistance if helpful</p>	<p>No restriction on decision making</p> <p>May still execute documents including AHCD, POA/DPOA, Contract, Will and Supported Decision Maker Agreement; if adult understands the nature and intent of document.</p> <p>Needs assistance with understanding or processing information to make simple and complex decisions</p>	<p>May still execute an documents including AHCD, POA/DPOA, Contract, Will and Supported Decision Maker Agreement; if adult understands the nature and intent of document.</p> <p>May not be able to understand or process information to make simple and complex decisions</p> <p>If attending Dr. determines adult cannot make medical decisions; if there is an AHCD it will be followed. If no AHCD, Dr. may name a Surrogate Decision Maker for medical decisions only.</p>	<ul style="list-style-type: none"> •Is not able to execute any documents. •Is not able to understand or process information to make simple and complex decisions •If attending Dr. determines adult cannot make medical decisions; if there is an AHCD it will be followed. If no AHCD, Dr. may name a Surrogate Decision Maker for medical decisions only. •If there is a DPOA, it will be followed. •Court of Chancery of Delaware will make determination of mental incapacity and appoint a guardian of property and/or person.

How do I support someone and help them make their own decisions?

- Supported Decision Making
- Representative/Substitute Payee
- Case/Care management systems
- Release forms
- Community advocacy systems/agencies

Supported Decision Making

- Found at Title 16, Chapter 94A of the Delaware Code.
<https://delcode.delaware.gov/title16/c094a/index.shtml>
- It is intended for individuals who do not need someone else to make the decision, but who would benefit from assistance in gathering or examining information.
- The role of the Supporter is to assist the adult in gathering and assessing information, and in evaluating the options, responsibilities and consequences of the adult's life decisions, including those about health care, financial decisions, and support services.
- The Supporter is chosen by the Principal. The Supporter does not have individual authority to make decisions.
- Supported Decision Making Agreement must be signed by the adult, two witnesses, and the appointed Supporter.
- Agreement is executed and witnessed, and indicates what type of assistance is needed and what the supporter has permission to do.
- Authority as "supporter" may be revoked by individual.

Representative Payee

- ▶ A Representative Payee is a person or organization appointed by the Social Security Administration (Social Security or “SSA”) to receive benefits for anyone who can't manage or direct the management of his/her benefits.
- ▶ Benefits must be used for the beneficiary's current or future needs, or conserved for later use. A payee must keep a record of expenditures and provide an accounting upon request.
- ▶ Social Security presumes an adult is capable of managing his/her benefits. If this may not be true, the party interested in acting as Representative Payee must provide sufficient evidence to Social Security for them to decide a payee is needed, or SSA may investigate independently.

Other support forms:

- Utilizing consents or a Bank Authorization Form. (Note supported decision-making relies on this as well) Individuals and those they wish to designate as authorized to assist the individual must go to the bank to obtain forms and direction.
- Enlisting Community or Service Support systems, such as Senior Center programs or Meals on Wheels.
- Using release forms at medical offices/educational facilities to allow assistance by those close to the individual. (Note, supported decision-making relies on this as well).

When am I able to make decisions for them?

- Surrogate Decision Making
- Durable Power of Attorney (not for healthcare)
- Advanced Health Care Directive
- DMOST
- Guardianship

Surrogate Decision Making

➤ **Currently at 16 Del.C. 2507 – Updated to 16 Del.C. 2512 (9/30/25)**

➤ Updated by:

Delaware Uniform Health-Care Decisions Act (SB 309 w / SA 1)

- Enacted September 30, 2024-----Effective September 30, 2025
- Update developed through Policy and Uniform Law Commission Process
- Modernizes and Updates

Surrogate Decision Making

16 Del.C Sec. 2507 (Current until 9-30-2025)

- A surrogate may make health care decisions to treat, withdraw or withhold treatment for an adult patient if the patient has been determined by the attending physician to lack capacity and there are no alternatives.
- This determination shall be confirmed in writing in the patient's medical record by the attending physician.
- Without this determination and confirmation, the patient is presumed to have capacity and may give or revoke an advance health care directive or disqualify a surrogate.

Who can be a Surrogate Decision Maker?

- The spouse, unless a petition for divorce has been filed;
- An adult child;
- A parent;
- An adult sibling;
- An adult grandchild;
- An adult niece or nephew;
- An adult aunt or uncle.
- OR
- Another adult, other than a paid caregiver, who exhibits concern for the patient, is familiar with the patient's personal values, and who is reasonably available may act if the adult patient is in an acute care setting or is a client of the Department of Health and Social Services and none of the listed individuals are eligible or available to act.

Updated Default Surrogate Law

- Effective September 30, 2025
- Uniform Health Care Decisions Act, Senate Bill 309 (<https://legis.delaware.gov/BillDetail/141421>)
- The new act modernizes the default surrogate provisions that allow family members and certain other people close to the patient to make decisions in the event the patient lacks capacity and has not appointed a health-care agent.
- The new default surrogate provisions update the priority list in the previous 1993 Act to reflect a broader array of relationships and family structures.
- It also provides additional options to address disagreements among default surrogates who have equal priority.
- Clarifies the duties and powers of surrogates, and includes the ability to apply for health insurance for a patient who does not have another fiduciary to do so.

Testamentary Capacity

(Required to execute medical and financial directives)

- ▶ Delaware Law presumes testamentary capacity. This is a low standard.
- ▶ “An individual must be capable of exercising thought, reflection and judgment, and must know what he or she is doing and how he or she is (potentially) disposing of his or her property.” IMO Estate of DeGroat, C.A. 12738-VCZ, (April 30, 2020)
- ▶ The law requires the individual to have known they were disposing of their property and to whom in the matter of a will. Id.

Advanced Health Care Directives, and Durable Powers of Attorney

- These options should be explored prior to obtaining a guardianship to make healthcare and financial decisions for who needs assistance.
- Delaware law establishes that testamentary capacity is sufficient to validly execute a Power of Attorney and an Advanced Health Care Directive.
- In this context, the level of capacity necessary to execute these documents is: That one must, at the time of execution, be capable of exercising thought, reflection, and judgment, and must understand the nature and effect of the document.
- Execution of the Power of Attorney may also require consideration that the individual understands disposition of property is possible.

AHCD/Durable Power of Attorney

- An Advanced Health Care Directive allows for medical direction and appoints an agent to assist with medical decisions within the parameters described in the document regarding the wishes of the person.
- A Durable Personal Power of Attorney is durable because it is designed to survive the incapacity of the principal. It is personal because it relates only to personal assets and interests, not routine business matters that are specific event targeted and short lived, and it is a power of attorney because it allows one person, the principal, to give authority to another person, the agent, to act on the principal's behalf. It relates only to financial matters; it does not relate to health care decisions.

Guardianship:

- ▶ A person with a disability is defined under Delaware law as someone who “[b]y reason of mental or physical incapacity is unable properly to manage or care for their own person or property, or both, and, in consequence thereof, is in danger of dissipating or losing such property or of becoming the victim of designing persons or, in the case where a guardian of the person is sought, such person is in danger of substantially endangering person’s own health, or of becoming subject to abuse by other persons or of becoming the victim of designing persons[.]” 12 Del. C. § 3901(a)(2).

Guardianship:

- May be Guardian of Person:
 - This guardian makes decisions about the personal and medical care of the person with a disability while keeping the person with a disability's best interest in mind. Responsibilities may include decisions as to where the disabled person will reside, resolving medical issues and providing consent for treatment as needed.
- May be Guardian of Property:
 - This guardian makes decision about the financial welfare of the person with a disability while keeping the best interests of the person with a disability in mind. Responsibilities may include opening, managing, and closing bank accounts, managing investment or retirement funds, and managing real property.
- May be both Guardian of Person and Property:
- May be Surrogate decision maker and Guardian of Property:
- May be Guardian of Person and Representative Payee:

GUARDIANSHIP PROCESS: (Office of the Public Guardian)

- Referral is made to the OPG. Referral includes questions regarding the basic health and finances of the individual, and what the
- Referral is reviewed. OPG is currently accepting appointment in emergent cases only (includes both medical and financial emergent).
- Physician completes a Physician's affidavit indicating the person lacks capacity.
- Physician's Affidavit and Petition are filed with the Court of Chancery, with a consent from the Office of the Public Guardian. OPG does not file for its own appointment, so there must be an attorney or entity to file the petition.

GUARDIANSHIP PROCESS CONTINUED:

- Once petition is accepted, the Court will issue a Preliminary Order, which assigns an attorney ad Litem, and sets a court date within 30 days for a routine hearing.
- A routine hearing is sufficient if neither the person nor interested parties contest the appointment of a guardian, or the appointment of the proposed guardian.
- The Attorney ad Litem arranges an interview with the person with an alleged disability, to evaluate the circumstances asserted in the petition and whether alternatives have been exhausted, and to get input from the person with a disability.

Physician's Affidavit

- ▶ The Physician's Affidavit and sample forms are available on the court's website at <https://courts.delaware.gov/forms/>. Search in the Court of Chancery forms.
- ▶ The patient is or is not able to perform the following functions independently: Activities of daily living, Pay his/her own bills, Live alone Take medication appropriately, Give informed consent for medical procedures, Is able to resist scams, among other measures.

Guardianship: (Con't)

- The hearing is held, and if there are no objections, the guardian will be appointed at the Routine Hearing.
- If there is any objection, the hearing is continued in order to allow for the objecting party to make an appropriate petition or case.

Conclusion

- When an individual needs assistance with decision-making, best practice is to start with least restrictive alternatives, which are easier to implement, and work up to Guardianship, which is the most procedurally and financially complicated.