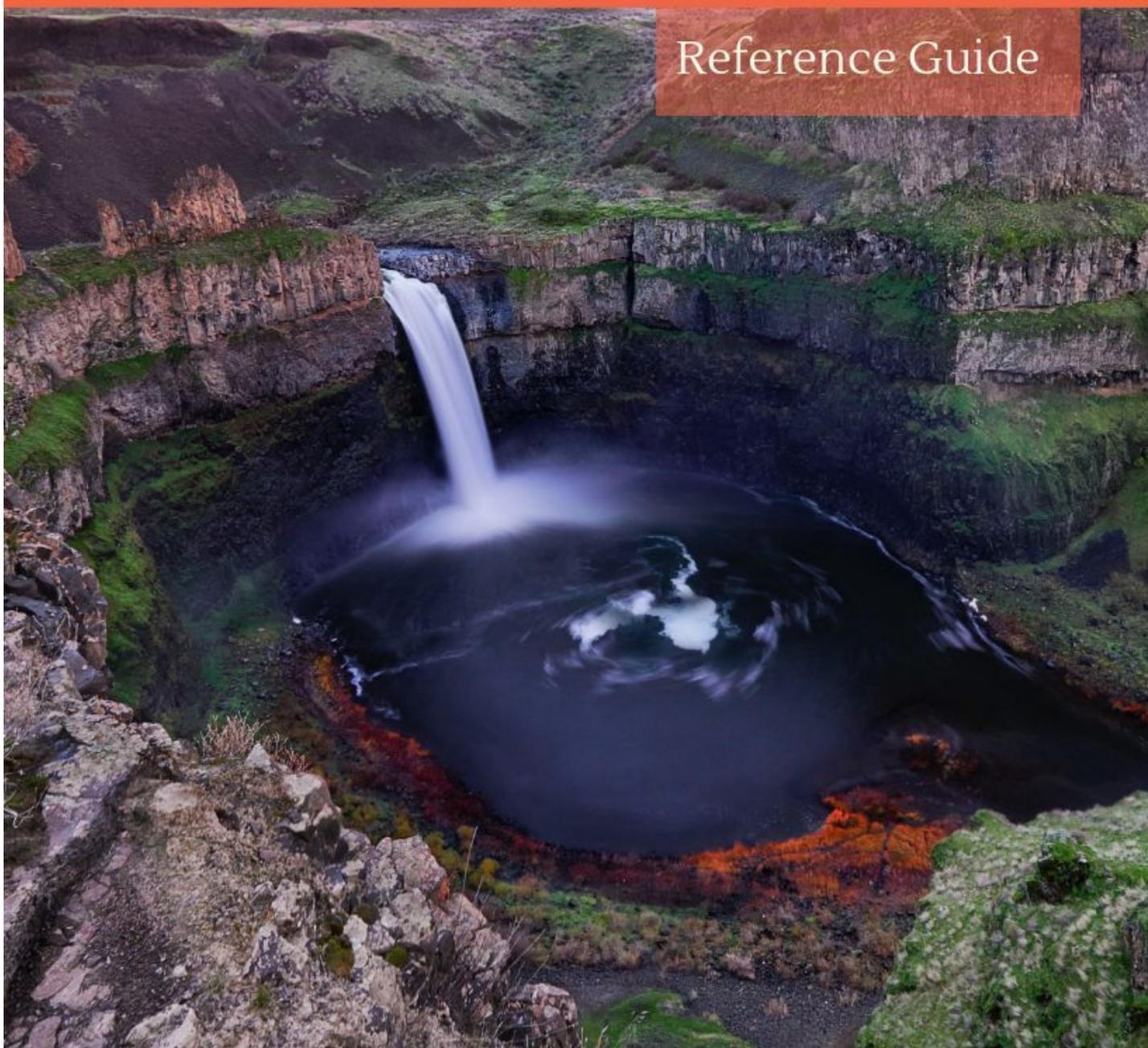


# Who Decides?

## Powers of Attorney & Resident Autonomy

Reference Guide





The Washington State Long-Term Care Ombudsman Program (LTCOP) is an independent statewide organization that advocates for the residents of nursing homes, adult family homes, and assisted living facilities.

LTCOP's mission is to support the quality of life and dignity of these residents by supporting and promoting their access to the Resident Rights they are guaranteed under Federal and State law.

Our trained staff and volunteers provide residents, their families and long-term care professionals with information about Resident Rights, other applicable legal rights and available resources. They investigate and resolve complaints concerning resident autonomy, health, safety, care, welfare and rights. They also help to ensure that residents are treated in a fair and dignified manner.

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## Introduction

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In 2017 the Washington State Legislature directed the LTCOP to provide information about surrogate (sometimes referred to as "substitute") decision makers for persons working in long-term care facilities (LTCF). A surrogate decision-maker is someone who has been given the authority to make certain decisions on another person's behalf and for that person's benefit.

You are likely familiar with common forms of surrogate decision-making such as guardianship and powers of attorney.

While they may be common, the extent of their authority is not always clear or completely understood by persons working in LTCF. That lack of understanding may also extend to the residents and those who serve as surrogate decision makers.

The failure to fully understand the intent and scope of a power of attorney or guardianship order can lead to situations that can both unnecessarily complicate LTCF staff's ability to care for a resident, and in turn, negatively impact a resident's autonomy and quality of life.

This Reference Guide has been prepared to support the presentation "Who decides? Powers of Attorney & Resident Autonomy", which is available on the Washington LTCOP website at [www.waombudsman.org](http://www.waombudsman.org).

It can also be employed as an independent resource.

The Reference Guide is not intended to provide an exhaustive review of powers of attorney, but instead to focus on the basic information that LTCF staff should know when dealing with a resident who has a power of attorney, or may be in need of one.

The Reference Guide does not attempt to provide a detailed discussion of the complex set of laws and regulations that govern a power of attorney. References to applicable legal authorities and information about how to access them can be found in the Appendix to the Reference Guide.

The Reference Guide is also not intended to provide, or function as a substitute for, legal advice. The laws on substitute decision-making are subject to change. Major changes concerning powers of attorney became effective in January 2017, and the effects of those changes are in process. Long-term care facility administrators may choose to exercise their discretion to seek legal advice to determine the scope and effect of the laws governing powers of attorney.

The Reference Guide is divided into 4 Sections.

- Section 1: KEY CONCEPTS  
*Purpose – Capacity, Definitions and Determination*
- Section 2: EXECUTION, DURATION & TERMINATION  
*Executing a POA – Current Status of POA – Terminating POA*
- Section 3: RESIDENT REPRESENTATIVES (Agents)  
*Appointment - Authorization - Prohibited Acts -POA Requirements - Duties & Obligations – Resident’s Reasonable Expectations*
- Section 4: LONG TERM CARE FACILITY ROLE  
*Obtaining & Accepting a POA – Resident Representative’s Certification - Reliance on Resident Representative Authority - Court Oversight & Mandated Reporting*

Information is presented in a convenient “Q&A” format throughout, allowing you to quickly locate a particular topic or issue.

Additionally, as this Reference Guide is primarily intended for use in connection with residents in licensed long-term care facilities, please note the following. POA generally use standardized terms in their text. Two commonly found terms are:

Principal: the individual who creates a power of attorney, giving someone else authority to act on the Principal's behalf

Agent: the chosen individual who receives authority through the POA to act on behalf of the Principal<sup>1</sup>

For practical purposes the following terms will be substituted throughout.

- "Resident" for "Principal"
- "Resident Representative" or "Representative" for "Agent".

The valuable time and effort that you expend reviewing the information in this Reference Guide will hopefully enable you recognize and avoid, or better handle issues that may arise while providing care for your residents who have a power of attorney or are in need of one.

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<sup>1</sup> Another term for "Agent" that is sometimes used is "Attorney-in-Fact"; it does not mean "lawyer" or "Attorney at Law".

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# Contents

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	<b>Page</b>
<b>Introduction</b>	i
<b>Section 1: KEY CONCEPTS</b>	
<i>Purpose – Capacity, Definitions and Determination</i>	
<i><u>Purpose</u></i>	
What is a power of attorney?	1
Does having a power of attorney require a resident to give up independent decision-making authority?	1
<i><u>Capacity, Definitions and Determination</u></i>	
What is “capacity”?	1
Are there different types of “capacity”?	2
What is “legal capacity”?	2
Why is a resident’s capacity important?	2-3
Is there a definition of capacity?	3
How is capacity determined?	3-4
What can influence or affect a person’s capacity?	3
How should a resident’s decision-making capacity be determined?	4-5
<b>SECTION 2: EXECUTION, DURATION &amp; TERMINATION</b>	
<i>Execution of a Power of Attorney – Current Status – Terminating a Power of Attorney</i>	
<i><u>Executing a Power of Attorney</u></i>	
How does a resident execute (sign) a power of attorney?	6
<i><u>Current Status</u></i>	
When does a power of attorney take effect ? (What is the Current Status?)	7

	<b>Page</b>
<u>Terminating a Power of Attorney</u>	
How and when does a power of attorney terminate (end)?	7-8
Can a resident revoke a representative's authority?	8
Will a resident's execution of a new power of attorney revoke any prior ones?	8
What if there is more than one power of attorney in existence?	9
Can a power of attorney terminate based on a resident's lack of capacity?	9-10

### **Section 3: RESIDENT REPRESENTATIVES (Agents)**

*Appointment - Authority - Prohibited Acts - Power of Attorney Written Requirements –  
Duties & Obligations – Resident's Reasonable Expectations – Best Interests*

#### Appointment

Who can a resident appoint as a representative?	11
Is anyone prohibited from becoming a representative?	11
What is the resident representative's role?	11
Can a resident appoint more than one representative?	12
What if there is a conflict between representatives who share decision-making authority?	12
What if there is no representative, co or successor representative available or willing to act?	13-14

#### Authority

What can a resident authorize a representative to do?	14
---	----

#### Prohibited Acts

What is a resident representative prohibited from doing?	14
Can a representative be held liable to the resident for any decisions the representative makes?	14

#### Power of Attorney - Written Requirements

What must be written in a power of attorney in order to give a representative decision-making authority?	15-17
--	-------

	<b>Page</b>
What authority does the representative have under the new Described Term “Health Care”?	17
What is meant by Informed Consent for health care decisions?	17-18
<i><u>Duties &amp; Obligations - Resident’s Reasonable Expectations</u></i>	
What duties and obligations does a resident representative have?	18
Can the resident representative override a resident’s decision?	18-19
What responsibility does representative have where a resident lacks Legal Capacity?	20
What should a representative do if a resident’s reasonable expectations are unknown?	20

## **Section 4: LONG TERM CARE FACILITY & PROVIDERS**

### *Obtaining & Accepting a Power of Attorney – Resident Representative Certification - Reliance on Resident Representative Authority – Court Oversight & Mandated Reporting - Obtaining & Accepting Power of Attorney*

#### *Obtaining & Accepting a Power of Attorney*

Is a long-term care facility or provider required to request a copy of the resident’s power of attorney?	21
What if the resident does not have a power of attorney or declines to provide one?	21
I have received a copy of a resident’s power of attorney, what is my first step?	22

#### *Representative Certification*

What is the purpose of a resident representative’s certification?	22-23
What benefit does a resident representative’s certification provide?	23
Is there any potential penalty for refusing to accept a resident representative’s certification?	23
Can a translation of a power of attorney be requested?	24
What are my next steps once the power of attorney has been accepted?	24

#### *Reliance on Resident Representative Authority*

When is it appropriate to accept a power of attorney and rely on a resident representative’s decision-making authority?	24-25
When is it justified to refuse to accept a power of attorney or a resident representative’s authority?	25-26

	<b>Page</b>
What basic steps can a long-term care facility do to support the rights of a resident who has a power of attorney and a resident representative?	26-27
<i><u>Court Oversight &amp; Mandated Reporting</u></i>	
Is it possible to obtain court oversight of a power of attorney?	27
What remedies can the court provide?	28
Do mandated reporter responsibilities apply to the actions of a resident representative?	28
<b>Appendix</b>	
Where can I find the law governing Powers of Attorney?	29
Where can I find the Washington State Resident Rights law?	29
Where can I find information about the obligations of skilled nursing facilities?	29
Where can I find information about the obligations of assisted living facilities?	30
Where can I find information about the obligations of adult family homes?	30
Where can I find information about how to report my concerns to Adult Protective Services/Department of Health and Social Services about a vulnerable adult?	30

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## Section 1: Key Concepts

### *Purpose – Capacity, Definitions and Determination*

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#### Purpose

##### **What is a power of attorney?**

A power of attorney (POA) is intended to be a convenient way for a resident to give a chosen, trusted person the authority to make decisions that a resident has independent authority to make:

- While a resident still has capacity, and
- To plan for a time when a resident may not have that capacity.

A POA must be a written document, but no particular format is required.

State law regulates a POA in many significant ways. Information about how to access the current and previous Washington State law governing POA can be found in the Appendix to this Reference Guide.

##### **Does having a power of attorney require a resident to give up independent decision-making authority?**

A resident does not surrender independent decision-making authority by having a power of attorney (POA). Assuming the resident has the necessary capacity, the resident retains decision-making authority over all personal and property related affairs, even if the resident has authorized a representative to act through a POA.

#### Capacity, Definitions and Determination

##### **What is “capacity”?**

On the most basic level, when we talk about a person’s “capacity” we are referring to that person’s ability to think clearly, recall facts and events accurately, communicate thoughts, plan and execute actions, and understand the potential outcomes of those actions. A person’s capacity is ordinarily assessed on a decision specific basis rather than a global one.

## **Are there different types of capacity?**

The law takes into consideration various types of capacity, such as the ability to:

- Execute a will – Testamentary Capacity
- Enter into a contract or conduct a transaction – Contractual Capacity
- Provide consent for health care – Informed Consent

## **What is “legal capacity”?**

The law also takes into consideration the concept of “Legal Capacity”. It is important to understand that this concept is a purely legal one. A medical opinion is relevant but may not be the deciding factor that leads to a determination that a resident either has or lacks Legal Capacity to make decisions affecting the resident’s personal and or property interests.

## **Why is a resident’s capacity important?**

All persons over 18 are presumed to have the capacity to make choices and decisions concerning all aspects of their life, which would include their residence in a long-term care facility. Importantly, the state Resident Rights law provides that residents continue to enjoy their basic civil and legal rights. In addition, the law protects a resident’s right to exercise reasonable control over life decisions, including those that affect health care, activities, and personal associations and communication.

Even where it has been determined that a resident lacks capacity to make certain decisions, or that capacity is subject to question, a resident’s expressed choices and desires (written, verbal, present and historical) must be considered and respected consistent with and in support of the resident’s guaranteed Resident Rights.

Capacity is especially important for a power of attorney (POA) because a resident must have the capacity to either validly execute (sign) or terminate (end) a POA.

Additionally, a validly executed POA and the representative authority it provides will become invalid at the point a resident is determined to lack capacity, unless the resident has planned ahead and insured that the POA contains language that enables it to survive that determination.<sup>1</sup>

### **Is there a definition of capacity?**

The law contains a number of “definitions” that are used describe capacity for specific purposes, including the provision of informed consent for health care, and assessing the need for the appointment of a guardian.

As of January 1, 2017 and thereafter, the law governing powers of attorney was amended to define “Incapacity”, in part as an:

- Inability to manage property, business, personal, or health care affairs, because of an
- Impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance...

The application of this, or any other definition of capacity, to a particular person or situation should only be done with a consideration of the existing factors that might influence or affect a person’s capacity.

Long-term care facility administrators may choose to exercise their discretion to seek legal advice concerning the meaning and application of the concept of capacity in general and to any particular person or situation.

### **How is capacity determined?**

There is no single test to determine a capacity. Medical professionals conduct and rely on a number of different assessments and examinations in order to reach an opinion regarding a person’s capacity.

A power of attorney (POA) may contain instructions about how a resident’s capacity is to be determined. For example, the POA may

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<sup>1</sup> The execution, termination and survivability of a POA are discussed in Section 2 of this Reference Guide.

state that one or more physicians who know the resident may make the determination.

- If the POA has no instructions, the resident's lack of capacity can be determined by one of the following: a physician, licensed psychologist, judge, or government official.

In the situation where a resident has a court-appointed guardian, a court has formally determined that the resident lacks legal capacity to make some or all decisions regarding his or her personal and property interests.

However, except where a court has appointed a guardian for a resident, it is far more likely that a resident's capacity has not been formally determined.

### **What can influence or affect a person's capacity?**

A person's capacity can be influenced and affected by a number of factors including:

- Life experience and education.
- Medications.
- Chemical dependence.
- Time of day.
- Events that produce anxiety, depression or grief.
- Mental illness.
- Vision loss.
- Hearing loss.
- Strokes.
- Dementia.

The existence of any of these factors should be seriously taken into consideration when attempting to assess capacity as they can individually or in combination provide an incomplete and inaccurate picture of a person's cognitive abilities.

### **How should a resident's decision-making capacity be determined?**

A resident's decision-making capacity should be determined *at the time the resident is required to make a particular decision or take a particular action.*

That determination should take into consideration any factors that can influence or affect a resident's capacity at that time.

This flexible approach will both appropriately take into account the fact that a resident's ability to understand and make decisions can vary over time and according to subject matter, and ensure that the resident's desires and preferences are considered and respected consistent with the rights guaranteed the resident by law.

Long-term care facility administrators may choose to exercise their discretion to seek legal advice concerning the assessment of any particular resident's capacity.

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## Section 2: Execution, Duration & Termination

*Executing a Power of Attorney – Current Status – Terminating a Power of Attorney*

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### Executing a Power of Attorney

#### **How does a resident execute (sign) a power of attorney?**

At the time the power of attorney (POA) is executed (signed) the resident must have:

- Capacity to sign, and
- Signed it without duress or undue influence (of the resident's own free will).

Before January 1, 2017: it was unnecessary for the resident to sign any POA created before this date in the presence of a notary, or before witnesses. It may have been signed before a notary, or witnesses, but this formality was not required, except for particular transactions that you will not encounter.

 New Law: January 1, 2017 and thereafter: the resident must sign any POA created on or after this date in the presence of a notary. Alternately, it can be attested to by 2 or more competent witnesses who sign the POA in the presence of and at the request of the resident.

- The witnesses may not be health care or long-term care facility owners, administrators, providers, or employees. They also may not be related to the resident by blood, marriage or state registered domestic partnership. Additionally, a Long-Term Care Ombuds cannot act as a witness.

Long-term care facility administrators may choose to exercise their discretion to seek legal advice should questions arise about the validity of any particular POA.

## Current Status

### **When does a power of attorney take effect (What is the Current Status)?**

Generally, the power of attorney (POA), and the resident representative's decision-making authority, will take effect when the resident executes it. However, the resident may decide that the POA and the representative's authority should commence at a future date, or be contingent upon some future event.

The only true way to determine the current status of a POA is to read it.

## Terminating a Power of Attorney

### **How and when does a power of attorney terminate (end)?**

The law uses the terms "terminate" or "termination" to refer to the way in which a power of attorney (POA) and the authority given to the resident representative ends.

A POA can be written to last for either a specific period of time or an indefinite one.

It is important to read and review the POA to find out the conditions by which the POA, and the representative's decision-making authority, may come to an end.

The law specifies that the POA will terminate for any of the following reasons:

- The resident dies.
- The resident representative dies, or resigns and POA does not appoint a co or successor representative.
- The POA provides that it terminates, or its purpose is accomplished.
- A court action that modifies or terminates a POA.

Additionally, a POA will terminate where the resident and the representative are married or have a State Registered Domestic Partnership (SRDP) under the following conditions.

- For a POA executed before January 1, 2017: The POA terminates when the annulment/dissolution or legal

separation is formally completed and the marriage or SRDP is legally annulled or dissolved.

- ➔ • New Law: For a POA executed on January 1, 2017 and thereafter: the POA terminates when the action for annulment/dissolution or legal separation is commenced but not completed.

Please note that the resident representative's authority will be reinstated if the marital action is withdrawn or dismissed before completion.

Long-term care facility administrators may choose to exercise their discretion to seek legal advice regarding the status of a resident's marriage or state domestic partnership.

### **Can a resident revoke (terminate) a representative's authority?**

A resident who has capacity can revoke the representative's authority at any time.

The revocation can be partial, ending the representative's authority to make a particular decision, or total, ending the representative's authority to make any decisions.

The revocation can be made verbally or in writing. The resident should take care to advise any person who might rely on the Resident Representative's authority that the authority has been revoked.

### **Will a resident's execution of a new power of attorney revoke any prior ones?**

The resident can revoke a prior power of attorney (POA) by executing a new POA, however the resident should include language in the new POA that clearly revokes any prior POAs.

- ➔ • New Law: for a POA executed on January 1, 2017 and thereafter: the new POA must expressly revoke any prior POA.

### **What if there is more than one power of attorney in existence?**

It is the resident's responsibility to inform all resident representatives and long-term care facility staff about the revocation of a prior power of attorney (POA). The resident must have capacity in order to revoke a POA.

It would be inappropriate for staff to choose to honor one representative over another where the existence of two or more POAs presents a conflict.

In the event of a conflict It is important for long-term care facility staff to ensure that the resident's rights are protected, and the resident's expressed choices and desires (written, verbal, current and historical) are respected.

Long-term care facility administrators may choose to exercise their discretion to seek legal advice if more than one POA appears to be in effect.

Additionally, your local Long-Term Care Ombuds (LTCO) is knowledgeable about Resident Rights law and is available to provide information and support the resident in such situations.

### **Can a power of attorney terminate based on a resident's lack of Capacity?**

A power of attorney (POA) will not survive a determination of a resident 's lack of capacity, unless the resident has planned for this eventuality and included language in the POA that clearly states the desire for the POA to continue.

This is accomplished by including language which states that the POA:

- "shall not be affected by the disability or incapacity of the Resident", or
- "shall become effective upon the disability or incapacity of the Resident", or
- " is Durable".

Other, similar language may also be used, so long as the intent is clear.

A POA that contains such direction by the resident is described as a “Durable” POA. A Durable POA survives even if the resident loses the capacity necessary to revoke it.

Additionally, a Resident can use the POA to nominate a chosen individual to serve as a court-appointed guardian should guardianship proceedings be initiated. The Court will generally honor that choice.

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## **Section 3: Resident Representatives (Agents)**

*Appointment - Authority - Prohibited Acts -Power of Attorney Written Requirements -  
Duties & Obligations – Resident’s Reasonable Expectations- Best Interest*

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### Appointment

#### **Who can a resident appoint as a representative?**

A resident can choose any trusted individual to serve.

#### **Is anyone prohibited from becoming a representative?**

The following persons may not be appointed as a resident representative unless they are also the resident’s spouse, state registered domestic partner, parent, adult child, brother or sister:

- Resident’s physicians or the physician’s employees, or
- Owners, administrators, or employees of a healthcare facility where the resident resides or receives care

#### **What is the resident representative’s Role?**

It is important to understand that the mere appointment of a person as a resident representative does not legally obligate that person to accept the appointment or take any action authorized by the power of attorney (POA).

If a representative accepts the appointment, is available and willing to make decisions and take action on behalf of the resident, then any decisions or actions must be:

- Consistent the authority given by the resident in the POA.
- Subject to the duties and obligations required of the representative by law.
- Consistent with the guarantees in the Resident Rights law.

### **Can a resident appoint more than one representative?**

A resident can appoint one or more co-representatives in the power of attorney (POA), who may share or have individual decision-making responsibilities.

The resident can also appoint one or more successor representatives in POA, who can assume responsibility if a primary representative is unavailable, unable or unwilling to act on the resident's behalf.

It is important to read and review the POA to identify any and all co or successor representatives and the authority they each were given by the resident.

### **What if there is a conflict between representatives who share decision-making authority?**

Where a power of attorney (POA) appoints co-representatives and provides equal authority to each, it is important that the representatives collaborate and reach agreement before making any decisions.

In the case of a conflict, long-term care facility staff may not choose to accept the authority of one representative over another. The resident with capacity has the right to choose among the representatives or make the decision independently.

Regardless, it is important that long-term care facility staff act to ensure that the resident's rights are protected, and the resident's expressed choices and desires (written, verbal, current and historical) are respected.

Long term care facility administrators may choose to exercise their discretion to seek legal advice in situations where there is conflict that cannot be resolved by the resident.

Additionally, your local Long-Term Care Ombuds (LTCO) is knowledgeable about Resident Rights law and is available to provide information and support the resident in such situations.

## **What if there is no representative, co or successor representative available or willing to act?**

The answer depends on whether the resident has the capacity necessary to take the action or make the decision at issue. Where the resident has the necessary capacity, then the resident retains the independent right to take action or make a decision.

Where the resident lacks capacity or is otherwise unable to make a particular decision that requires informed consent for a health care decision, the following individuals may be available to make a decision on behalf of the resident:

- Court appointed guardian.
- Representative appointed under a Durable power of attorney.
- Spouse.
- Adult children.
- Parents.
- Adult brothers and sisters.

Please note that the list is hierarchical – go down the list until an able willing individual is identified.

If there is more than one individual in a category, they must agree on the decision. You cannot move down the list to the next category if agreement cannot be obtained. In the absence of agreement it may be necessary to seek a court appointed guardian. Additionally, the facility staff as mandated reporters should make a report to Adult Protective Services and seek technical guidance from their licensing entity as soon as possible.

Note: nieces and nephews are not on the list of surrogate decisions makers, they may only make informed consent decisions if they have been appointed guardian for the individual, or if the individual has designated them as a representative for health care decisions under a Durable power of attorney.

Where the resident lacks capacity or is otherwise unable to make a particular decision concerning a matter other than informed consent for health care it may be necessary to seek a court appointed guardian. Additionally, the facility staff as mandated reporters should make a report to Adult Protective Services and seek technical guidance from their licensing entity as soon as possible.

Long-term care facility administrators may choose to exercise their discretion to seek legal advice in such situations.

Additionally, your local Long-Term Care Ombuds (LTCO) is knowledgeable about Resident Rights law and is available to provide information and support the resident in such situations.

### Authority

#### **What can a resident authorize a representative to do?**

Generally resident can give authority to representative for any lawful decision or action that he or she could do.

### Prohibited Acts

#### **What is a representative prohibited from doing?**

The resident representative *may not* involuntarily commit the resident for:

- Mental health treatment.
- Therapy or other procedure that induces convulsions.
- Surgery solely for the purpose of psychosurgery.
- Other psychiatric/mental health procedures that restrict freedom of movement.
- Placement in a residential treatment facility that provides nursing or other care (long-term care facility).

#### **Can a representative be held liable to the resident for any decisions the representative makes?**

In general any issue of liability for actions taken or decisions made by the resident representative is between the resident and the resident representative, and not the representative and the long-term care facility.

However, the representative will not have any liability to resident the representative acts in good faith, in support of, and consistent with resident's direction and known intentions, and if those intentions are unknown, then if the representative in resident's best interests.

## Power of Attorney - Written Requirements

### **What must be written in a power of attorney in order to give a representative decision-making authority?**

The power of attorney (POA) must explicitly provide the resident representative with the authority to make certain types of decisions, including the authority to do any of the following:

- Give informed consent for resident **Health Care** decisions.
- Delegate some or all of the authority given by the POA.
- Make a gift of resident property.
- Change a resident's beneficiary designations.
- Change resident's rights of survivorship.
- Create amend, revoke, or terminate an inter vivos trust.
- Waive the resident's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan.
- Exercise fiduciary powers that the resident has authority to delegate.
- Exercise any power of appointment in favor of anyone other than the resident.
- Create, amend, or revoke a community property agreement.
- Cause a trustee to make distributions of property held in trust under the same conditions that the resident could.
- Make any other provisions for non-probate transfer at death contained in non-testamentary instruments.

It is important to read and review the POA to determine the extent of representative's authority to make any decisions on behalf of the resident.

For example, in terms of health care related decisions, at a minimum POA should authorize representative to:

- Provide informed consent for health care decisions, and
- Access and release resident health care information.

 **New law: for POA executed January 1, 2017 and thereafter, representative authority may be given by using general language and or by reference to “Descriptive Terms” in the POA.**

As of January 1, 2017 and thereafter the law includes a new set of “Descriptive Terms” that describe certain types of decision-making authority that can be given to a resident representative.

The complete set of “Descriptive Terms” is:

Health Care; Real Property; Tangible Personal Property; Banks and Financial Institutions; Stocks Bonds and Financial Instruments; Military, Civil Benefits; Retirement Benefits and Deferred Compensation; Operation of a Business or Entity; Estates, Trusts and other Beneficial Interests; Claims and Litigation; Personal and Family Maintenance; Gifts; Taxes; Principal’s Minor Children.

For POA executed before January 1, 2017, the law included only two Descriptive Terms: Banking and Homestead matters.

If the POA gives the representative authority to “do all the acts that resident could do”, or words of similar intent then the:

- Representative receives general authority to make decisions concerning anything that is described in the entire set of Descriptive Terms that are in the new law.

If POA gives representative authority with respect to a Descriptive Term, then the:

- Representative receives authority to act with respect to any matter covered by that specific Descriptive Term.

In either case no further language is necessary, but the POA can have qualifying language that adds or subtracts from the authority that is given in the Descriptive Term.

If you are presented with a POA that has a general grant of authority, or has references to Descriptive Terms, it will be necessary to read and review the descriptions of authority found in the law in order to fully understand the authority that the resident representative has been given.

### **What authority does the representative have under the new Descriptive Term “Health Care”?**

For any power of attorney (POA) executed January 1, 2017 and thereafter: if the POA grants the representative general authority or explicitly refers to the term “health care”, representative is authorized to:

- Provide informed consent for health care decisions.
- Access and Consent to the release of Resident health care information.

The POA may contain additional language expanding or qualifying this basic grant of authority. *More importantly:*

- The resident’s physician and or employees, and the owners, administrators, employees of health care or long-term care facility **are prohibited** from becoming the resident representative, unless the individual is also the resident’s spouse, state registered domestic partner, parent, adult child, or sibling.

### **What is meant by “Informed Consent” for health care decisions?**

Informed consent for health care decisions means that the following information must be explained to the resident in a language or manner the resident can understand:

- The current and expected medical condition.
- The proposed treatment.
- The anticipated results of the proposed treatment.
- The recognized possible alternative forms of treatment.
- The serious possible risks, complications, and anticipated benefits of the proposed and any alternative form of treatment.

The resident must also be advised of the right to:

- Choose to not to be informed.
- Refuse care and service options during assessment & care plan development.
- Change your mind about any previous consent or refusal decision.

### *Duties & Obligations – Resident’s Reasonable Expectations – Best Interests*

#### **What duties and obligations does a resident representative have?**

The representative owes a significant number of duties and obligations to the resident. They include, but are not limited to, the following:

- Act in good faith, loyally and for the resident’s benefit and only within the extent of the authority granted by the power of attorney (POA).
- Exercise care, competence and diligence when engaging another person on behalf of the resident.
- Never delegate authority to another person unless specifically authorized by the POA and then exercise care, competence diligence selecting and monitoring that person.
- Fiduciary relationship concerning the resident’s finances and property.
- Act in accordance with the resident’s reasonable expectations, if known, if unknown, then act in the resident’s best interest.

#### **Can the resident representative override a resident’s decision?**

Generally, the answer is “No”. A resident does not surrender independent decision-making authority by simply executing a power of attorney (POA).

Additionally, a resident with capacity can revoke a representative’s authority to make a particular decision at any time.

Even where a resident lacks capacity to make a decision, the resident representative is obligated to act in accordance with the resident’s reasonable expectations, if known. If those expectations are

unknown, then the representative must act in the resident's best interest.

Example 1: A resident may be incapable of taking medications according to schedule, but can understand what a particular medication is intended for. The representative may not exclude the resident from any discussion with facility staff about that medication, and the resident must be provided the ability to participate to the extent that the resident is desirous and capable.

Example 2: A resident may not be able to understand that a particular activity takes place every Tuesday afternoon at 2 P.M., but understands and desires that he wants to participate in that activity. The representative may not override the resident's expressed desire to participate, and the resident must be provided the ability to safely participate in the activity to the extent that the resident is desirous and capable.

Example 3: A resident may not always remember the name of a particular person or her relationship to that person, but can fully understand how much she wants to see that person and enjoy a visit with that person. The representative may not simply block the resident's ability to enjoy that person's company. The resident must be provided the ability to visit and communicate with that person to the extent that the resident is desirous and capable. If there is an issue of actual or suspected abuse or exploitation, the appropriate authorities should be contacted.

This flexible approach will ensure that the resident's desires and preferences are considered and respected consistent with the rights guaranteed the resident by law.

In these situations it would always be appropriate to contact your local Long-Term Care Ombuds for information regarding the resident's rights. The Ombuds is available to support and protect the resident's rights in such situations.

## **What responsibility does the representative have where resident lacks Capacity?**

The resident representative has the same basic responsibility as when the resident's capacity to make a particular decision is not compromised:

- To act in accordance with the resident's reasonable expectations when they are known.
- To act in the resident's best interests when the reasonable expectations are unknown.

## **What should a resident representative do if resident's reasonable expectations are unknown?**

Where the resident's reasonable expectations are unknown, whether due to a lack of capacity or the inability to effectively express and communicate choices and desires, the resident's representative should always:

- Choose what resident would do if the resident was competent and aware of all the circumstances including the effect of the lack of capacity.
- Give substantial weight to the resident's current stated desires and wishes as expressed through past statements, practices, information shared with others and observations.
- Seriously consider resident behavior and verbal expressions, as they are both a form of communication.
- Consider the opinions of professionals, relatives and friends with knowledge of the resident.
- Seek independent professional evaluations and opinions to support decision-making.
- Only after these options have been exhausted make a decision that is in the resident's best interest.

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## **Section 4: Long-Term Care Facility Role**

*Obtaining & Accepting a Power of Attorney – Resident Representative’s Certification -  
Reliance on Resident Representative Authority – Court Oversight & Mandated Reporting*

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### *Obtaining & Accepting a Power of Attorney*

#### **Is a long-term care facility required to request a copy of a resident’s power of attorney?**

All long-term care facilities must determine and document in the resident’s record:

- The resident’s cognitive capacity.
- Whether the resident has a guardian, a power of attorney (POA) or any type of advanced directives.
- Whether the resident or a surrogate decision-maker has the authority to make healthcare decisions

Accordingly, a long-term care facility must request that the resident provide a copy of any existing POA. It is not necessary to obtain the original power of attorney, it is sufficient to obtain a photocopy or email copy for your use and records.

#### **What if the resident does not have a power of attorney, or declines to provide one?**

The long-term facility’s responsibility is to obtain copy of any existing power of attorney (POA). It may not compel the resident to provide one. The resident should be advised and encouraged to consider the usefulness and importance of having a POA in place, but it is solely the resident’s choice to have a POA or not have one.

## **I have received a copy of a resident's power of attorney, what is my first step?**

 **New Law: For a power of attorney executed on January 1, 2017 and thereafter:** The power of attorney (POA) must be accepted no later than seven (7) business days after the POA's presentation, or a request must be made for a written certification from the resident representative. If a request for a certification is made, and one is provided, the POA must be accepted no later than five (5) business days after certification is received.

For a POA executed before January 1, 2017, a certification could be made available at the representative's discretion. However, both the certification and the acceptance of the POA are not subject to any legal timelines.

### **Resident Representative's Certification**

#### **What is the purpose of a resident representative's certification?**

Residents ordinarily have powers of attorney and appointed representatives, and there is rarely any need to question either the validity of a power of attorney or of a resident representative's authority.

However, should the need arise, the law now permits facility to request a written certification from the resident representative. The certification is a written document that is made by the representative under the penalties of perjury.

In the certification, the representative affirms that the:

- Power of attorney (POA) appoints him/her as resident representative.
- Resident was competent at the time the POA was executed.
- Resident executed the POA without any undue pressure or coercion.

- Representative has no knowledge of any facts or other circumstances that would indicate that either the POA, or that the representative's authority is void, invalid, modified, or terminated.

Washington state law now provides a convenient certification form for the resident representative to use at RCW 11.125.430.

### **What benefit does a certification provide?**

One benefit of the certification is that no further investigation of either the power of attorney (POA)'s validity or the representative's authority is required.

However, reliance on the certification would not be available where you have knowledge of any information that contradicts any of the statements made by the representative in the certification.

### **Is there any potential penalty for refusing to accept a resident representative's certification?**

The unjustified refusal to accept a representative's certification may result in the resident or representative initiating a court proceeding, which can result in:

- A court order mandating acceptance of the power of attorney (POA), and
- Liability to pay for the resident and or representative's reasonable attorneys' fees and costs.

The representative's authority may be rejected if one or more of the conditions that permit a refusal to accept either a POA or a representative's authority are present. Those conditions are discussed below under the question "When is it justified to refuse to accept a POA or a Representative's authority?"

Long-term care facility administrators may choose to exercise their discretion to seek legal advice regarding the decision to request a representative's certification.

## **Can a translation of a power of attorney be requested?**

Yes. A translation of all or part of a power of attorney (POA) can be requested. The request is subject to the same timelines and consequences as a representative's Certification discussed above.

## **What are my next steps once the power of attorney is accepted?<sup>2</sup>**

Once you have the accepted power of attorney (POA) in hand, you should take the time to read and review the POA to find out some very basic but also quite important information:

- How did the resident execute (sign) the POA?
- Is the POA in effect currently, or will it take effect on a future date?
- How does the POA terminate (end)?
- Who is the resident's representative and what authority did the resident give to the representative?
- Is there a co-representative, a successor representative, and what authority were they given?

## **Reliance on Resident Representative Authority**

### **When is it appropriate to accept a power of attorney and rely on resident representative decision-making authority?**

Residents who have a power of attorney (POA) and an appointed representative are common, and ordinarily there is no reason to question a POA and or a resident representative's authority.

However, should the need arise it would obviously be appropriate to accept a POA and rely on a representative's authority when a:

- Resident with capacity confirms the validity of the POA and the representative's authority.
- Resident representative's Certification is received and the long-term care facility has no actual knowledge or a good faith belief of facts that would contradict the statements made in the Certification.

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<sup>2</sup> The execution, current status and termination of a POA are discussed in Section 2 of this Reference Guide. Resident representatives and their authority are discussed in Section 3.

 New Law: For a POA executed on January 1, 2017 and thereafter, an employer will be protected from liability where an employee accepts a POA and resident representative authority in good faith and without actual knowledge of any of the above-described circumstances.

For a POA executed before January 1, 2017, an employer will be protected from liability where an employee accepts a POA and resident representative authority, unless the employee knew or should have known of any of the above-described circumstances.

Long-term care facility administrators may chose to exercise their discretion to seek legal advice in situations where the validity of either a POA, or a resident representative's authority may be in question.

**When is it justified to refuse to accept a power of attorney or a representative's authority?**

A justified refusal to accept a power of attorney (POA) and or a representative's decision-making authority may be based on:

- Actual knowledge that the POA or the representative's authority is terminated.
- A good faith belief that POA is invalid, or the resident representative does not have authority, regardless of a Certification stating otherwise.
- Actual knowledge of a report to DSHS based on a good faith belief of abuse, neglect, exploitation, or abandonment by the representative person acting for the representative.
- A request for a resident representative Certification or a translation of the POA is refused.
- A person<sup>3</sup> is not required to perform the requested service for the resident.
- A person could not perform the service consistent with Federal law.

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<sup>3</sup> "A person" includes a long-term care facility, or its staff.

A long-term care facility would not be justified in refusing to accept a POA or a representative's decision-making authority solely because of any disagreement the facility might with a decision made by the representative.<sup>4</sup>

Long-term care facility administrators may choose to exercise their discretion to seek legal advice in situations where the validity of either a POA, or a resident representative's authority may be in question.

### **What basic steps can a long-term care facility do to support the rights of a resident who has a power of attorney and a resident representative?**

A long-term care facility must:

- Ensure that a resident's representative is able to participate in resident related decision-making
- Observe that the resident's representative acts consistent with the authority that has been given by the power of attorney, and is supportive of the resident's rights as guaranteed by law.

All long-term care facilities are required to comply with the rights granted to their residents by Washington's Resident Rights law, and the laws and regulations governing each type of facility.

Those Resident Rights include the right to:

- Participate in planning care and treatment.
- Receive and refuse any particular service.
- Choose activities, schedules and healthcare consistent with interests and care plans.
- Privacy in communications.
- Communication with people inside and outside the facility.
- Visits from family, friends and others.
- Access to physicians, WA representatives, advocates, LTC Ombuds.
- Freedom from physical & chemical restraints, verbal, sexual & mental abuse, corporal punishment, involuntary seclusion or isolation.

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<sup>4</sup> The rules governing the acceptance of a POA are discussed above in the question "I have received a copy of the POA, what are my first steps?"

Consistent with resident rights laws, a long-term care facility has the obligation to promote a resident's right to participate in all decision-making to the maximum extent that the resident is willing and capable. This is so even where a resident may have a resident representative appointed by a power of attorney.

The facility should take appropriate actions to ensure that the resident's rights are protected whenever facility staff:

- Believes that a resident's representative is not exercising appropriate authority on behalf of the resident.
- Has any grounds to refuse to accept the representative's authority.
- Has any knowledge of suspected or actual abuse, neglect, exploitation, or abandonment by a resident representative or a person acting for representative.

Long-term Care Facility administrators may exercise their discretion to seek legal advice regarding Resident Rights and the facility's duties and obligations to promote them and ensure the facility's compliance with them.

Your local Long-Term Care Ombuds (LTCO) is knowledgeable about Resident Rights law and is available to provide information and support for a resident.

### *Court Oversight & Mandated Reporting*

#### **Is it possible to obtain court oversight of a power of attorney?**

Unless the power of attorney (POA) provides otherwise, a Petition to the court may be filed by a:

- Resident.
- Resident representative, or person asked to serve as Representative.
- Spouse or state registered domestic partner.
- Guardian.
- Other interested person - but note that the court must be satisfied the person is interested in resident's welfare, has a good faith belief that court intervention is necessary, and the resident is incapacitated, unable to protect her interests at time of filing.

## **What remedies can the court provide?**

The court has broad powers to intervene and provide effective remedies, which may include the following:

- Determine the status of a power of attorney (POA) or modify it.
- Ratify past and or pending resident representative acts or order the representative to not take action.
- Remove the representative for violation of fiduciary duties or in the best interest of resident.
- Compel the representative to report, or submit accounts.
- Confirm the authority of a successor representative.
- Compel the acceptance of a POA and to honor the representative's authority.

Additionally, the court may award attorneys' fees to the prevailing party:

- If the validity of a POA is confirmed or the acceptance of a POA is mandated.
- In its discretion in other circumstances.

Long-term care facility administrators may choose to exercise their discretion to seek legal advice regarding the need to seek court oversight.

## **Do mandated reporter responsibilities apply to the actions of a resident representative?**

Long-term care facility staff are mandated reporters and must report to the appropriate authorities any instances of actual or suspected abuse, neglect, exploitation, abandonment by a resident representative or a person acting for representative.

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## Appendix

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### **Where can I find the law governing Powers of Attorney?**

The law governing Powers of Attorney **on or after January 1, 2017** can be found online at *Chapter 11.125 RCW*.

<http://app.leg.wa.gov/RCW/default.aspx?cite=11.125>

The law governing Powers of Attorney **prior to January 1, 2017** can be found online at the former *Chapter 11.125 RCW*.

<http://leg.wa.gov/CodeReviser/RCWArchive/Documents/2016/Title%202011%20RCW.pdf>

### **Where can I find the Washington State Resident Rights law?**

The Washington State Resident Rights law can be found at Revised Code of Washington, Chapter *70.129 RCW*. They may be reviewed online at

<http://app.leg.wa.gov/RCW/default.aspx?cite=70.129>

### **Where can I find information about the obligations of skilled nursing facilities?**

The Washington State regulations governing skilled nursing facilities are found at Washington Administrative Code, Chapter *388-97 WAC*. They may be reviewed online at

<http://apps.leg.wa.gov/WAC/default.aspx?cite=388-97>

The Federal regulations governing skilled nursing facilities are found at Washington Title *42 CFR Part 483, Subpart B*. They may be reviewed online at

<https://www.law.cornell.edu/cfr/text/42/part-483/subpart-B>

**Where can I find information about the obligations of assisted living facilities?**

The Washington State regulations governing assisted living facilities are found at Washington Administrative Code, Chapter *388-78A WAC*. They may be reviewed online at

<http://apps.leg.wa.gov/WAC/default.aspx?cite=388-78A>

**Where can I find information about the obligations of adult family homes?**

The Washington State regulations governing adult family homes are found at Washington Administrative Code, Chapter *388-76 WAC*. They may be reviewed online at

<http://app.leg.wa.gov/WAC/default.aspx?cite=388-76>

**Where can I find information about how to report my concerns to Adult Protective Services/Department of Health and Social Services about a vulnerable adult?**

Information about how to report concerns of actual or suspected abuse, neglect, self-neglect, or exploitation concerning a vulnerable adult can be found online at

<https://www.dshs.wa.gov/altsa/home-and-community-services/report-concerns-involving-vulnerable-adults>