

Durable Power of Attorney- FAQs

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**Washington State Department of
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Division of Developmental Disabilities Community &
Services

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Durable Power of Attorney-Frequently Asked Questions

The Developmental Disabilities Community & Services division has gathered the most frequently asked questions for a Durable Power of Attorney to help you find the information you need quickly and easily.

1. Does a Durable Power of Attorney have the same authority as a guardian?

Not necessarily. While they may be similar in some ways, a guardianship is often broader than a DPOA, and in a guardianship proceeding a person is determined to be incapacitated by a court and may have many rights taken away.

2. Is a DPOA established in court?

Not necessarily, but a court may be involved in the process and sometimes supports a person to create a DPOA as a less restrictive alternative to guardianship. Unlike guardianship, which is established by a court because a person is determined to be “incapacitated”, a DPOA is an agreement between a “competent person” (aka, “principal”) and another person (aka, “agent”). The principal has given specific decision-making authority under specific circumstances to their agent, which may go into effect immediately or if the principal becomes incapacitated.

Deeming someone as incapacitated is a different process for guardianship and DPOA. In guardianship, incapacity is a legal process always determined by a court, but for the purposes of DPOA, incapacity might be determined by doctors, psychologists, a judge, or other person that the client nominates.

Note: A person who is already determined to be incapacitated may not give DPOA authority to another. If the person is already incapacitated, then guardianship would be needed.

3. May DPOA be used as a substitute for guardianship?

If DPOA is a less restrictive alternative to guardianship chosen by a person, it may serve a similar purpose. However, if a person does not have the capacity to understand the rights they would be granting to their “agent” through DPOA, they may require a guardian, and they cannot give initiate a DPOA.

4. What should DPOA include to grant someone the legal authority to sign for a client’s DDCCS services?

It must be a Durable Power of Attorney for **health care decisions**. Other authorities granted to a person’s agent through DPOA may not be acceptable for this purpose. For example, a DPOA for financial decisions does not give the proper authority to consent for DDCCS services, unless the only

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DDCS services a person receives are financial in nature, such as clients whose only service is the State Supplementary Payment.

5. Does DPOA have a specific time limit for review like a guardianship?

Typically, a DPOA does not have an expiration date and does not need to be reviewed, but it could state an expiration date and may identify specific criteria about when it is or is not in effect. The details in each DPOA may be unique and they should be reviewed to determine what they entail before proceeding. Contact your regional guardianship coordinator for support if needed.

6. If someone claims to be the client's DPOA, will the DDCS Case Resource Manager accept the verbal assertion and document it in the DDCS Assessment?

No. If the client does not have a guardian but does have a DPOA for healthcare decisions, then to obtain consent from the person's agent and to provide DDCS services, DDCS requires a copy of the DPOA agreement in Legal section of the client's file. It must be lawfully executed under Washington state law defined in RCW 11.125, including the signature and witness requirements described in RCW 11.125.050.

Once valid documentation has been obtained, the agent identified with DPOA for healthcare decisions may be listed in the DDCS Assessment Collateral Contacts with the role of "Durable Power of Atty/Healthcare." This identifies the agent as having the right to sign for the client's DDCS services.

Note: *If you receive a DPOA document and in your professional judgment you question the client's ability to understand what rights they may have given to a person through a DPOA, you and your supervisor should consult with your regional guardianship coordinator.*

7. Does a DPOA go into effect immediately upon the signature/date of the client?

It is determined that the assumption for DDCS clients who have agreed to a Durable Power of Attorney intend to have the agreement go into effect immediately. This means the DPOA for health care decisions may sign for services. However, unless the client who has established a DPOA has subsequently become incapacitated (is still "competent"), the client also retains their right to consent for services.

If the DPOA agreement specifically gives a future date or a "trigger" event before it goes into effect, then you must follow that directive.

For example: A DPOA was just established by a 45-year-old client who can make his own decisions. The client has a family history of strokes after the age of 50. The DPOA nominates his sister as his

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agent, and it states it will go into effect when the client turns 50 years old or if he has a debilitating stroke, whichever comes first. The client also nominated his personal physician to decide of his capacity after a stroke. In this case, the client was looking ahead and preparing for the day he would require assistance from the DPOA.

8. Can you have a guardian and a DPOA that are two different people?

Yes. Under the new Uniform Guardianship Act for adults which went into effect 1/1/22, a person may continue to have a valid DPOA while subject to a guardianship, unless the court orders otherwise.

9. What happens if a person and their agent in DPOA disagree?

If a person has not been determined incapacitated by the entities identified in the DPOA, such as their personal physician, they still retain the right to make their own decisions, and their wishes should be taken as primary. If a person is determined incapacitated as described in the DPOA, then the agent could execute the rights granted to them. However, the agent should make the decision the person would make if they were able, in accordance with their known wishes.

10. What happens if someone wants a different agent, or is the agent unwilling or unable to act?

A DPOA can be terminated as described in RCW 11.125.100. A person's agent can refuse to act and is not obligated to perform as an agent, whereas a guardian is obligated by a court to act.

11. Is a DPOA that was established in another state valid in Washington state?

Yes, assuming it was lawfully executed under that state's law. If you have questions about the legality of a DPOA from another state, contact your regional guardianship coordinator.

12. What do I do if the person who claims to be the DPOA for healthcare decisions refuses to provide the documentation?

Do one or more of the following:

- Explain that DDA is legally required to obtain proof of legal decision maker status. DDA is required to verify DPOA status before allowing someone other than the client to consent to services. Mail DSHS Form 16-213, *Verification of Legal Status*, to the person.
- Explain that without proof of DPOA for health care decisions, DDA would seek consent from the client, unless the person does not have capacity to understand their services. If a person does not have that capacity, then there may be no option for someone to consent.

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Note: If there is any question whether the client has the capacity to understand service decisions or manage their basic affairs (even though there is a designated NSA), if there is not a guardianship in place we must contact the regional guardianship coordinator. Follow WAC 388- 845-3056, *What if I need assistance to understand my plan of care or individual support plan?* and WAC 388-845-3070, *What happens if I do not sign or verbally consent to my individual support plan?*

The case resource manager must document the efforts to receive a copy of the DPOA in a client's Service Episode Record. Discuss this with your supervisor and the regional guardianship coordinator. The refusal of a DPOA to provide documentation of valid DPOA may place client services in jeopardy.

13. Is there a public website available to search for Washington State DPOA records?

No. While some DPOAs may be filed with the county record keeping office, there is no way to obtain a copy of the document without a fee, which DDCS does not pay. The copy of the agreement must be received from the client, or their agent identified in the DPOA.

14. What is 'informed consent' and how is it obtained when there is no guardian?

A person gives informed consent when they provide health care authorization for a person not competent to do so themselves. DDCS/HCS/APS staff are not able to make these decisions for their clients. You should first work with the health care provider and explain the situation and give an honest assessment of the ability of the adults to make this decision. If the hospital refuses to treat a client due to concerns with their ability to consent to treatment, state law lists those persons authorized to make the decision for them. They are:

- Legal guardians.
- Someone holding durable power of attorney for health care.
- A spouse.
- Children of the adult (must be at least 18 years old).
- Parents.
- Adult brothers or sisters.

You should contact these people in the order above since the decisions of those listed first take priority over the others. If it is an emergency and the hospital or facility won't act, APS/social work staff and the Attorney General's Office can petition the court for appointment of a guardian ad litem to make the decisions.

Do you have a question that's not listed? Please submit it to Jeanette.Childress1@dshs.wa.gov to add it to the DDCS Durable Power of Attorney FAQs.

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