



Advice for Agents (Medical)

Information for agents appointed under an enduring power of attorney (medical treatment)

What is an enduring power of attorney (medical treatment)?

An enduring power of attorney (medical treatment) is a legal document where an individual (the 'donor') appoints another person (the 'agent') with the power to make decisions about medical treatment on their behalf.

The enduring power of attorney (medical treatment) - EPA (MT) - only takes effect if and when the donor becomes incompetent, that is, when the donor is unable to make decisions for themselves due to accident or illness resulting in incapacity.

Which relevant laws give the attorney decision-making powers?

A donor can appoint an agent to make medical decisions under the *Medical Treatment Act 1988*.

The *Guardianship and Administration Act 1986* sets out who has the authority to consent to medical and dental treatment when the patient is incapable of providing consent themselves. The Act permits the person responsible to consent to medical and dental treatment. It specifies a hierarchy of people who have that authority to make decisions, and the first person listed who is available and willing is 'the person responsible'. An agent appointed under an EPA (MT) is the first category listed. For further information, see the fact sheet *Medical/Dental Treatment for Patients who Cannot Consent* from the Office of the Public Advocate (OPA).

When is a person incapable of making their own decisions?

A person is incapable of making their own decisions about medical/dental treatment if they lack capacity.

To have capacity is to have the ability to reason things out, that is, to:

- understand
- retain
- believe
- evaluate (i.e. process), and
- weigh relevant information

A person lacks capacity to give consent to medical/dental treatment if:

- they are incapable of understanding the general nature and effect of the proposed procedure or treatment; or
- they are incapable of indicating whether or not they consent to the carrying out of the proposed procedure or treatment.

Who assesses the donor's capacity to make their own decisions about medical treatment?

In some instances, it is very clear that the donor does not have the capacity to make their own medical decisions, such as if they are in a coma. At other times, the donor may consider themselves competent to make decisions for themselves, but their agent or someone else may be concerned that this is not the case. In some instances, the donor may only be competent at certain times.

An agent may seek advice from the donor's doctor if they are unsure whether the donor has lost capacity. In some instances, the doctor may be unable to advise the agent, or may think a specialist report is required. The agent may then have to ask the donor to see a relevant specialist such as a geriatrician, psychiatrist or neuropsychologist.

The donor may need to sign a consent form to allow the agent to discuss health information with their doctor. A sample consent form is available at www.publicadvocate.vic.gov.au, or call OPA's Advice Service on 1300 309 337 for assistance.

Obtaining a specialist's report may be expensive, so the agent may have to consider how this will be paid for, either by the donor or by the person looking after the donor's money. This may be a person appointed under an enduring power of attorney (financial) or an administrator. Alternately, it may be possible to obtain an assessment and specialist's report through the public health system.

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What is medical treatment?

The Medical Treatment Act and the Guardianship and Administration Act each define medical treatment differently but, generally, medical treatment includes an operation, or a medical or surgical procedure, examination and any preventative, or rehabilitative care.

The agent, as ‘person responsible’, can also make decisions in relation to dental treatment.

What is health care?

Health care encompasses more than medical and dental treatment. Health care may include therapies such as physiotherapy, mobility exercises, and alternative therapies. The agent does not have authority to consent to such therapies as they are not medical and dental treatment.

If an agent is unsure whether a treatment is best described as ‘medical treatment’ or ‘health care’, they should contact the OPA Advice Service.

If the donor has appointed an enduring guardian in addition to an enduring power of attorney (medical treatment), or if VCAT has appointed a guardian with health care powers, then the agent has responsibilities for medical and dental treatment decisions, but the guardian has responsibility for health care decisions.

What is the difference between an agent, a guardian and a person responsible?

An agent is appointed under an EPA (MT).

A guardian can be appointed by the donor under an Enduring Power of Guardianship (EPG) or by order of VCAT. Guardians have the powers set out in the EPG or the VCAT order, and this can include decisions in relation to medical treatment, as well as decisions in relation to health care.

The person responsible is the first person listed in the hierarchy set out in the Guardianship and Administration Act. As stated above, an agent appointed under an EPA (MT) is the first category listed in that hierarchy. The person responsible can consent to proposed medical or dental treatment, or withhold consent to treatment.

Only guardians appointed by VCAT, or agents, can refuse medical treatment (see below for an explanation of the difference between withholding consent and refusing treatment).

What types of decisions can the agent make?

An enduring power of attorney (medical treatment) states that the agent may make decisions about medical treatment on behalf of the donor. The agent can make any decision the donor would make if they had the capacity to do so.

If a medical practitioner or dentist proposes medical or dental treatment, the agent may:

- consent to the treatment
- withhold consent to the treatment
- refuse the treatment.

The processes which flow from withholding consent and refusing treatment are different, and explained below. Only agents and guardians appointed by VCAT have the authority to refuse treatment.

What types of medical decisions can't an agent make?

An agent cannot consent to the following medical procedures:

- those likely to lead to permanent infertility
- termination of a pregnancy
- removal of tissue for transplant.

If these treatments are recommended, an application needs to be made to VCAT for a decision.

An agent cannot refuse medical treatment to alleviate pain, suffering and discomfort (palliative care).

What criteria should inform the agent's consent to treatment?

The law requires that the agent make decisions that would be in the best interests of the donor.

The following matters must be considered:

- the donor's wishes, so far as they can be ascertained
- the wishes of family members
- the consequences to the donor if the treatment is not carried out
- whether there are alternative treatment options
- the nature and degree of risks associated with the treatment
- whether the treatment is to promote and maintain the health and well-being of the patient.

If the agent encounters any conflict of interest or has any concerns, they can ask VCAT for advice.

Consenting to treatment

If the agent thinks the treatment proposed is in the best interests of the donor, then they would consent. Sometimes this needs to be signed consent, but often it is sufficient to provide verbal consent.

If the agent does not agree with the proposed treatment, they may withhold consent.

If a doctor disagrees with the agent withholding consent to medical treatment, they may serve the agent with a notice. The agent may then choose to take the matter to VCAT for a decision. If the agent does not take the matter to VCAT, then the doctor may proceed with the proposed medical treatment.

Refusing treatment – competent person

A competent person can refuse medical treatment for any reason. They need to complete a *Refusal of Treatment Certificate - Competent Person*.

Refusing treatment – incompetent person

An agent can refuse treatment for a donor. They need to complete the form *Refusal of Treatment Certificate Agent or Guardian of Incompetent Person*. This certificate needs to meet the requirements of the Medical Treatment Act.

In making a decision to refuse treatment the agent must certify as follows:

“I have been informed about and understand the nature of the patient’s current condition to an extent that would be reasonably sufficient to enable the patient, if he/she were competent, to make a decision about whether or not to refuse medical treatment generally or of a particular kind for that condition. I believe that the patient would request that no medical treatment, or no medical treatment of the particular kind mentioned below, be administered to him/her.”

An agent may only refuse medical treatment on behalf of a patient if:

- the medical treatment would cause unreasonable distress to the patient; or
- there are reasonable grounds for believing that the patient, if competent, and after giving serious consideration to his or her health and well-being, would consider that the medical treatment is unwarranted.

An agent cannot refuse palliative care. This is not considered ‘medical treatment’ for the purposes of the Medical Treatment Act.

End of life decision-making

It is possible, if an agent refuses medical treatment for a donor, that the donor will die from a potentially treatable illness, disease or medical complication. This is why there is a requirement for a *Refusal of Treatment Certificate Agent or Guardian of Incompetent Person*. This assists with ensuring a thorough, transparent process which ensures that the rights of the donor are met.

Sometimes medical practitioners and care providers will ask the agent to sign a *Not for Resuscitation* (NFR) or *Do Not Resuscitate* (DNR) form on behalf of the donor. These forms do not meet the requirements of the Medical Treatment Act and it is recommended that the agent does not sign such documents, but instead consider completing the *Refusal of Treatment Certificate Agent or Guardian of Incompetent Person* form. OPA strongly recommends that agents contact the OPA Advice Service on 1300 309 337 for more information about this complex matter.

How can the agent ascertain the donor’s wishes?

The donor and agent should discuss views about medical treatment in general when the EPA (MT) is made.

If the donor has a medical condition that may possibly lead to them losing capacity, then it would be advisable for the donor and the agent to discuss the donor’s wishes while they are still able to do so.

Situations often arise where the donor requires a specific form of medical treatment that they have not previously discussed with their agent. In these cases, the agent needs to use their knowledge of the donor, and consult with others around them who have an interest in the welfare of the donor, to gather any further information that may assist in making a decision that reflects what the donor would have decided if they had capacity.

Can someone appeal, or refuse to accept, the agent’s decision?

The agent appointed under an EPA (MT) may make a decision with which a family member or other person, who has an interest in the welfare of the donor, disagrees. If they think the agent is not acting in the best interests of the donor they may choose to make an application to VCAT. VCAT could order that the EPA (MT) be revoked and a guardian appointed instead.

If the health provider thinks the agent is not making a decision in

accordance with their powers and the law, they too may choose to make an application to VCAT.

If the health provider ignores the agent’s authority and looks to someone else to make decisions for the donor, the agent can:

- use the health provider’s grievance procedure to try to resolve the issue
- seek the advice of VCAT, as VCAT may provide a declaration of the agent’s authority, which may assist others in recognising that authority.

Can the agent force the health provider to offer treatment?

The agent can advocate for treatment for the donor. However, a health service cannot be compelled to provide medical treatment where the service has made a reasonable clinical decision that treatment is futile or would be unduly burdensome to the donor.

Can the agent make decisions that cost money?

There may be financial implications associated with decisions an agent makes about medical treatment for the donor. The agent must ensure the donor can afford the treatment they consent to on the donor’s behalf. If there is a financial attorney or an administrator appointed for the person, the agent should discuss the decision with them to be sure the donor can afford it.

Where is the EPA (MT) document kept?

The agent should keep a certified copy of the EPA (MT). The agent may need to produce the original EPA (MT), or a certified copy, when making decisions.

Health providers may assume the nearest relative is the ‘person responsible’ unless they are informed that an agent has been appointed.

Sometimes family members and other people with an interest in the welfare of the donor may not know that an agent has been appointed, or who that agent is.



What records should the agent keep?

It is recommended that the agent keeps a record of any medical decisions they make, and the reasons why they chose to make them. It may be helpful for the agent to keep copies of correspondence, as well as a record of conversations they have with service providers regarding the donor.

These records may prove useful in a dispute with a service provider, or if someone challenges that the decisions made by the agent were in the donor's best interests.

How does an EPA (MT) end?

An EPA (MT) ends under any of the following circumstances:

- the donor revokes the power (while competent to do so)
- the donor later appoints another agent or alternate agent
- VCAT revokes the power
- the donor dies
- the agent dies (where there is no alternate agent)
- the agent and alternate agent die.

Can the agent resign?

If the agent no longer wishes to accept the appointment they should communicate this to the donor, if the donor is still competent; then the donor can make other arrangements if they wish.

When can the alternate agent act?

The alternate agent may only act if the agent:

- dies
- cannot be contacted
- becomes incapacitated.

It is only in one of these circumstances that the alternate agent has any decision-making authority under the EPA (MT). It is recommended that the alternate agent contact OPA to discuss the procedural requirements in these situations.

If the agent resigns, the EPA (MT) no longer has any effect.

In the absence of an EPA(MT), decisions about medical treatment would fall to the next category of person listed in the hierarchy of 'person responsible' or consideration could be given to making an application to VCAT for a guardian.

What is VCAT's role?

VCAT can provide advice to the 'person responsible'. The agent must ensure that they do not wilfully conceal or misrepresent facts to VCAT.

If a person thinks the agent is not exercising their powers in the best interests of the donor, they may seek intervention by VCAT. VCAT may suspend the agent's power, vary the terms of the appointment or revoke the power.

Does VCAT charge a fee?

No, VCAT does not charge a fee. However, if the agent wants to be represented by a lawyer, they need to establish if this is a cost they pay personally, or if it is a reasonable expense of the estate of the donor. VCAT may be able to provide advice regarding this.

What if the agent needs assistance?

The law is complex, and the types of decisions an agent may be required to make are significant. If the agent is confused about the processes or principles which should inform the decisions they make, they should contact OPA's Advice Service.

Release of donor's health and personal information

The agent may be asked for permission to make decisions about the collection, use and/or disclosure of health or personal information relating to the donor.

The relevant legislation (the *Health Records Act 2001* and the *Information Privacy Act 2000*) respectively specify that the 'authorised representative' can provide substitute consent for an individual to the collection, use and disclosure of health information and personal information, subject to the privacy principles.

The agent is listed as the 'authorised representative'.

This area of law is quite complex. It would be wise for the agent to seek further advice if they are unclear whether they are the 'authorised representative' and to clarify the scope of their authority.

Where can the agent seek assistance?

The agent can seek advice from VCAT or contact OPA's Advice Service to help ensure they act in the best interests of the donor, and make decisions that are in accordance with the legislation.

Further information, including other fact sheets about powers of attorney, medical treatment and medical consent, is available at www.publicadvocate.vic.gov.au