



## Advance Health Directives and Personal/Health Enduring Powers of Attorney

Since the *Powers of Attorney Act 1998* came into force in Queensland on 1/6/98, adults can formally appoint an attorney to make health care decisions on their behalf and/or execute an 'Advance Health Directive' (sometimes called a living will). This living will instrument allows the principal (you) to give directions concerning end of life decisions and regarding the withholding or withdrawal of life sustaining measures.

The Act enables health care decisions expressed by adults when they were competent to be applied when they lose capacity.

The order of priority in dealing with special health care matters is:

- 1) an Advance Health Directive (which we will call an 'AHD' for shortness and simplicity in this explanation);
- 2) an attorney appointed under an enduring power of attorney;
- 3) a Statutory Health attorney;

and if none of the above exist, the Adult Guardian will be the decision maker of last resort.

Only an Advance Health Directive allows you to have control over the decision to withhold or withdraw life sustaining measures. A direction in an Advance Health Directive has priority over a general or specific power for health matters given to any attorney.

### Advance Health Directive (AHD)

An AHD is basically a direction given in advance of incapacity, indicating the type of medical treatment you would like to have, or not have, in the event that you are no longer competent to decide.

Arguably such a directive has the capacity to remove the decision making burden from the shoulders of family and friends who are often called on by medical staff to be involved in decisions about life sustaining treatment.

An AHD does not allow active euthanasia. The Act makes it clear that doing a positive act, the purpose of which is solely to cause death, is against the law.

However the AHD goes beyond the powers that can be given to an attorney under an enduring power of attorney. Even when the principal has given their attorney power to do anything in relation to their 'personal matters' (- defined to include health matters) - it is clear that from the Act that this power does not extend to 'special health matters'.

Only the principal can give instructions relating to these particular matters through an AHD. The issue of

withholding or withdrawal of life sustaining measures is such a special matter.

[Life sustaining measures are defined to include assisted ventilation, artificial nutrition and hydration and cardio-pulmonary resuscitation.]

The Act provides that by an AHD, the principal may:

- give directions about health matters and special health matters for personal future health care;
- give information about personal directions;
- if they have not already done so, appoint one or more persons who are eligible attorneys to exercise power for a health matter for the principal in the event the directions prove inadequate.

In the latter situation, the attorney's power is limited to a health matter only. This is defined in Schedule 2 of the act to be a matter relating to the care or treatment of or a service or procedure for the principal, to diagnose, maintain or treat the principal's physical or mental condition which is carried out by or under the supervision of a health provider.

Significantly, it does not extend to special health matters which involve the crucial issues of directions regarding withholding or withdrawal of life support.

The advance health directive is the **only** way to achieve this final measure of control and provide an opportunity to die with dignity.

Although the AHD form has no specific provision regarding agreement to receive experimental treatment or participate in research, Section 5 of the form does provide an opportunity for the principal to record personal wishes. These could include a willingness to be involved in such treatment or experimental research procedures.

### Formal Requirements

At least 3 people are involved in completing an AHD - the principal, a doctor and a witness.

A principal must be over 18 and capable of understanding the nature of the decisions and their effects.

The AHD must be signed by the principal or by an 'eligible signer' in the presence of and by the direction of the principal (this would be used only where, through physical injury or disability the principal is unable to sign the form themselves).

(Any such eligible signer must be at least 18, and must not be the witness for the document and must not be the principal's attorney.)

The AHD must also be signed and dated by an eligible witness who must be a JP, commissioner for affidavits, lawyer or notary public. To prevent any conflict of interest, the witness cannot be an attorney of the principal, a relation of the principal or of the principal's attorney, a current paid carer of the principal, or a current health care provider of the principal. The witness must be at least 21 and not be a beneficiary under the principal's will.

The witnessing provisions are strict, and most important. The importance is reflected in the occupational and age requirements of the witness, and the fact that the witness is providing more than just an assurance that the principal's signature is genuine. The witness certifying, amongst other things, that the principal appeared to understand:

- that the direction can be revoked at any time, provided the principal has the requisite capacity;
- that the direction is only operative while the principal has impaired capacity;
- the nature and probable affect of each direction.

We always very strongly recommend that an AHD is signed in consultation with the principal's usual medical practitioner, as the Act requires that the AHD also include a certificate signed and dated by a doctor, stating that the principal had the requisite capacity to make the directive.

The Act further provides that the doctor signing the certificate must not be:

- 1) the person witnessing the AHD, or
- 2) the person signing the AHD for the principal, or
- 3) the attorney of the principal, or
- 4) a relation of the principal or the principal's attorney, or
- 5) a beneficiary under the principal's will.

### Protection for Health Care Providers

The Act provides protection for health care providers in a number of situations:

- where the health care provider is unaware of the existence of an AHD, they will not be liable for any treatment provided contrary to the AHD (this is likely to occur in an accident or in an emergency where the principal's regular doctor or family have not been contacted, [but if a principal is concerned that to ensure that his or her wishes are carried out, a copy of the AHD could be provided to any person likely to be required to provide attention.]
- If the health care provider reasonably considers a direction uncertain, or because of advances in medical technology is unsound, they can decline to act in accordance with the direction without incurring liability.

### An Enduring Power of Attorney ('an EPA')

This formal agreement allows the principal to appoint an attorney to act in a representative capacity either generally or for certain limited purposes, including the right to make personal health care decisions.

**The attorney's power over health matters is only capable of being exercised when the principal loses the capacity to make and communicate those decisions.**

The attorney must be at least 18 and cannot be a health professional or paid health care provider.

The principal may appoint more than one attorney, with a different attorney being used for different purposes or periods, and an EPA validly made in another state will now be recognised in Queensland.

### Matters beyond an Attorney's power

Under the Act, no attorney has power to make a decision on behalf of a principal concerning special health matters, including:

- the withdrawal or withholding of life sustaining treatment;
- removal of tissue from the principal while alive for donation to someone else (the Transplantation and Anatomy Act continues to operate in this area);
- Participation by the principal in research or in experimental health care;
- certain psychiatric or other health care specified by regulation.

However, their decision making power **does** extend to health matters defined as a matters relating to health care (other than special health care) of the principles. This involves care or treatment for the principal which involves diagnosis or maintenance or treatment of the principle's physical or mental condition, but falls short of withdrawal of life sustaining measures.

Schedule 1 of the Act contains a statement of general principles and health care principles which provide the philosophical basis on which the attorney's conduct should be based when making a decision for a person with impaired capacity. These principles are drawn from a number of U.N. declarations on the rights of people with a disability. Schedule 1 also provides that the principle of substituted judgement be applied to decision making, which means that the attorney should attempt to make the decision the adult would have made had they been able to make the decision themselves.

### The Statutory Health Attorney

The Act makes provision for a Statutory Health Attorney to decide health matters (not including special health matters), **where a person is unable to make personal decisions and no AHD has been made, or attorney appointed.** The Statutory Attorney can make any decisions about health matters that the adult could lawfully make if the adult had capacity for the matter.

The Act sets down that a Statutory Health Attorney can be the first in a priority of the following people, provided the person is readily available and culturally appropriate to exercise power for the matter:

- a spouse (including a de-facto spouse) if the relationship between them is close and continuing.
- a carer of the person provided that they are at least 18 and not a paid carer;

- a person who is at least 18 who is a close friend or relation of the adult and not a paid carer of the adult;
- if no one is available or culturally appropriate in the above categories, then the Adult Guardian.

There is no formal appointment of a Statutory Health Attorney, the role simply being taken by default of other provisions in the Act - i.e. if no AHD has been signed and no EPA signed. This procedure of identifying the appropriate person for the role, and involving them in medical treatment decisions will replace the previous informal decision making arrangements that had previously occurred between next of kin and medical staff.

#### **Adult Guardian**

Where there is no AHD, no appointed attorney and no person who can act as Statutory Health Attorney, the Adult Guardian, or a Statutory Officer, will be the medical decision maker of the last resort.

#### **Summary**

The Act provides individuals with a mechanism whereby they can plan for their own incapacity with respect to important health care decisions.

These directives, while complicated, have the advantage of removing the decision making burden from the shoulders of family members and friends, who are often called on to take responsibility for, or at least be involved in, critical decisions about life sustaining treatment.

In addition, the presiding doctor's determination whether to treat or not treat the patient is settled, again removing the need for unnecessary consultation with family members at what is often a time of intense grief and emotions.

But perhaps the most significant advantage of the AHD is that encourages discussion between the principal, family members and health care professionals about death and dying.

As such it is not only the aged who will wish to set such a directive in place.

Any perceived inconvenience in reviewing and updating a directive from time to time will be compensated for by knowing that it offers an opportunity to make provision for death with dignity.

If you have any queries regarding the above please do not hesitate to contact our office.

**Garland Waddington**