



ANDERSONS
S O L I C I T O R S

LawTalk Blog



Advance Care Directives replace Power of Guardianship

Date: Monday September 29, 2014

You may currently be healthy with full capacity, but that does not mean that you should not have an Advance Care Directive ("**ACD**") in place. Ill-health unfortunately can happen unexpectedly and mental capacity to make a decision about your health can deteriorate quickly. This is why we recommend that clients, whilst they are still healthy and have capacity, put in place their wishes about their health care and medical treatment and who they would like to act for them in their place if they are unable to.

Prior to 1 July 2014 there were three separate legal documents that you could have to govern your health care and medical treatment in the event that you were unable to make a decision for yourself. These legal documents were:

1. Enduring Power of Guardianship;
2. Medical Power of Attorney; and
3. Anticipatory Directions.

If you had either an Enduring Power of Guardianship, Medical Power of Attorney or Anticipatory Direction drafted for you and they were not signed by the donee prior to 1 July 2014 then they will not be effective. If they were fully signed and completed prior to 1 July 2014 then the above legal documents will remain effective.

As of 1 July 2014 ACD's have replaced Enduring Power of Guardianship and Medical Power of Attorney and Anticipatory Directions pursuant to the *Advance Care Directives Act (2013) SA*, which has now come in to force.

An ACD is a legal form that allows adults to write down their wishes, preferences and instructions for future health care, end of life, living arrangements and personal matters and appoint one or more Substitute Decision Makers ("**SDM**") to make these decisions

on their behalf when they are unable to do so themselves. You can also make an ACD without having an SDM.

An ACD is used when you are unable to make your own decisions, whether temporarily or permanently, if you cannot understand information about the decision, understand and appreciate the risks and benefits of the choices, remember the information for a short time or tell someone what the decision is and why you have made the decision.

When you cannot make a decision because of loss of capacity your SDM will be able to legally make decisions about your health care, living arrangements and other personal matters when you are unable to. You can specify the types of decisions you want them to make in the Conditions of Appointment of the ACD. If you do not appoint any SDA others close to you may be asked to make decisions for you and must follow your wishes as per the ACD.

You can refuse health care in your ACD but you need to write down when or under what circumstances any refusals of health care apply and your health practitioner must follow the refusal. A health practitioner can only override a refusal if there is evidence that you have changed your mind or you did not mean for the refusal to apply in the current circumstances and the health practitioner will need consent from your SDM or Person Responsible.

It should be noted that in your ACD you cannot direct that there be a refusal of psychiatric treatment if there has been a treatment order made for your care pursuant to the *Mental Health Act 2009* which is a separate South Australian Act to the *Advance Care Directives Act*.

If you lose your capacity and your ability to make a decision about your health and you do not have an ACD then the *Consent Act* will apply to impaired decision making capacity and the *Guardianship Act* will apply if there is mental incapacity.

The ACD must be validly witnessed to be effective. Witnesses must confirm that they have provided the information required by the regulations and that the person giving the direction appeared to understand the information and explanation provided by the witness and did not appear to be acting under duress or coercion. The person witnessing the ACD must provide the Information Statement and ask the questions set out in the Information Statement.

The witness cannot be the SDM or anyone with a direct or indirect interest in the person's estate (beneficiary etc.) or:

1. The health practitioner responsible for the health care of the person;
2. In a position of authority in a hospital nursing home or other facility where the person giving the advance care directive is residing.

Once witnessed the ACD will be in force until it is revoked, until death or until an expiry date (if specified) has expired. The ACD can be revoked at any time by a person who is competent, which entails written revocation or giving another ACD. An ACD cannot be varied. If you require it to be varied a new ACD will need to be completed.

In summary the ACD is an important legal document that can be used to:

1. Record personal values and life goals and identify specific medical interventions or describe circumstances that a person would find unacceptable;

2. Express a person's wishes about residential matters as well as health and personal care; and
3. Appoint a substitute decision maker.

Please note, this Blog is posted in Adelaide, South Australia by Andersons Solicitors. It relates to South Australian legislation. Andersons Solicitors is a medium sized law firm servicing metropolitan Adelaide and regional South Australia across all areas of law for individuals and businesses.