



Wills & Deceased Estates Team

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## A message about Advance Care Directives – their value and why you need one

The COVID-19 pandemic caused many of us to think (whether for ourselves but perhaps particularly on behalf of loved ones) whether there should be a document in place that expresses our life priorities (including about health care) in the event that the capacity to make decisions is lost.

In that regard you may know what an Advance Care Directive (**ACD**) is – and does.

It used to be known as an Enduring Power of Guardianship (**EPOG**) although that document was usually limited to appointing someone to make 'guardian' type decisions. Sometimes people refer to such a document as a 'living will' or 'medical power of attorney'.

**\*Note:** *EPOG documents remain valid if fully signed (ie by the person making the appointment and by the guardian/s) before 11 December 2014.*

In operation for a decade now in South Australia, an ACD is largely a replacement for the old form of EPOG but offers a much greater ability to give directions about life priorities (including care and accommodation priorities) in the event that you do not have capacity to make those decisions yourself. It also enables you to appoint someone (called a 'substitute decision-maker') to speak on your behalf to carry out those wishes.

Whilst there is an ability under related law for particular relatives or even friends to make medical treatment decisions for you if your ability to make your own decisions is impaired, an ACD helps to avoid any difficulty that might arise if your relative or friend does not know what you want or they have a different view to you about what treatment you should receive.

So - what is a common understanding of why you would want an ACD? Probably 'so they can pull the plug if I'm cactus anyway'.

Fair enough too - but what if you are far from 'cactus' physically and there is no plug to be pulled?

Let's remember a few things:

Firstly, an ACD only becomes effective if you have lost the capacity to make decisions for yourself;

Secondly, an ACD allows you to state your wishes about not only health and medical treatment but 'lifestyle' more generally; and

Thirdly, an ACD allows you to appoint someone to carry out those wishes.

Now, let us say you are suffering from dementia but are otherwise in pretty good health. If you have made an ACD then you will likely have appointed a substitute decision-maker to make a wide range of health and lifestyle decisions and, most importantly, you will have set out your preferences and what you like them to know in making those decisions? Maybe – 'I'd like to see the family as often as I could'. Or, 'I'd like to be taken for a drive in the hills as often as is convenient for the family ....'

That brings us to another point - maybe you would like to lift the guilt your family will feel if they cannot be there for you as often as they (and you) would really like. Maybe you could tell them to prioritise their own family in responding to your needs?

Of course, there are lots of different circumstances which could arise and you cannot be too specific, but the more you think about it, the more it becomes apparent that providing some written guidance is a good thing - and that when to 'pull the plug' is just the start.

This raises the question of how you do an ACD?

In South Australia you complete (and sign) a particular form set by the government. It includes various

sections, including a section: *'What is important to me'*.

The challenge is how to think this question through and then put your thoughts into words.

Other questions in the ACD form include:

- *Health care I prefer*
- *Where I wish to live*
- *If I am nearing death, the following would be important to me*
- *I refuse the following health care*

You can only sign your ACD once all your substitute decision-makers have signed the form (they can either sign a hard copy form (in wet ink) or an electronic copy by adopting a digital signature). You must sign the hard copy form (in wet ink only) before an authorised witness (as listed in the Information for Witnesses sheet).

### Case Story

*Mark and Simone, a young couple in their late 20's, decided to update their wills as they had just welcomed a new baby into their family.*

*When asked whether they wanted to do an Advance Care Directive they declined.*

*'We don't need to do one of those. They are just for old people. We will worry about doing one when we are a lot older' was their response.*

*Unfortunately, six months after they updated their wills, Mark was involved in a serious car accident and suffered a catastrophic brain injury. He was lying in a comatose state in hospital where the doctors looked to Simone for the answers to their questions; questions she didn't have the answers for, because she and Mark had never discussed it.*

*Should they do surgery even though they were not sure he would survive it? Would Mark want to be resuscitated if something happened during surgery?*

*Would he want to be kept alive at all costs even if it was by a ventilator and tube fed?*

*If Mark survived the surgery, the doctors knew there was a great chance he could be permanently brain damaged. Would he want to live at home or be cared for at a disability facility?*

*Simone had no idea what Mark would want. They had never spoken about this because, in their mind, they were too young to worry about it.*

Had Mark and Simone discussed this ahead of time and included an ACD as part of their estate planning (at the same time they were already doing their wills), Simone would have known exactly what Mark would have wanted. Instead she had to guess what decisions to make and is now plagued with guilt as to whether she was doing the right thing for Mark or not.

### So, to summarise

A written formal ACD will give certainty to all (that is, you will **make sure** 'everyone knows what you want') and will give specific authority and comfort to those you appoint as substitute decision-makers.

It can be difficult for loved ones to make clear objective decisions about your care or life-prolonging measures during a sudden emergency if they are emotional or upset. Having an ACD in place can decrease the stress loved ones may face if they are asked to make decisions on your behalf.

At O'Loughlins Lawyers, we can assist you with completing an ACD which clearly and accurately expresses your wishes.

Remember that an ACD cannot be used to make financial or legal decisions. It is therefore recommended that, as well as an ACD, you have a Power of Attorney for decisions to be made about your future finances and legal matters.

Want to know more about Advance Care Directives and Powers of Attorney? Get in touch with us for more information.

**An ACD offers a much greater ability to give directions about life priorities in the event that you do not have capacity to make those decisions yourself.**

### Disclaimer

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