ADVANCE CARE PLANNING FOR INDIVIDUALS AND FAMILIES

HANDBOOK

MODULE 2

TOUCH STONE LIFECARE

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MODULE TWO

LEGAL CONSIDERATIONS

INTRODUCTION

As with any legal document that outlines a person's wishes for the future, each state and territory has its own specific rules around what is required for a document to be considered binding.

In this Module, we'll take you through the legal considerations around creating your Advance Care Plan in a little more detail. We'll cover the difference between Common and Statutory Law, explain Power of Attorney and its variations, as well as how and when your ACP could be challenged - and what happens if it is.

We always recommend sharing and discussing your Advance Care Plan with a lawyer as well as your GP and others, to ensure they can take a holistic approach to your legal needs and are kept up to date in case they are called on to confirm the validity of your plan.

Advance Care Plans in Australia

Advance Care Planning is supported by both Statute and Common Law in Australia. It is important that you understand the statutory requirements (if relevant) for your particular state or territory.

In the case of NSW and Tasmania, where there is no legislation around Advance Care Directives, they are subject only to Common Law.

STATUTORY VS COMMON LAW ADVANCE CARE PLANS

Statutory Advance Care Directives are legislated, state-based advance care directives or documents used to outline a person's preferences for care or for appointing a substitute decision maker.

All states and territories in Australia, other than NSW and Tasmania, have legislation which allows a person to formally make an advance care plan. We refer to these as 'statutory' advance care plans. Legislation is local law made by Parliament. For Advance Care Plans, such law is made at a state/territory level (rather than Federal).

The accepted content of statutory Advance Care Plans varies between states and territories. That is, state/territory legislation may not allow certain types of decisions to be made through an advance care plan (for instance, in relation to mental illness) – this differs in every state/territory.

Common law is law that has been created by courts or tribunals, when deciding individual cases over time. When courts or tribunals make these decisions, they consider similar cases that have been decided before, and the principles that arise out of such decisions – these are common law principles. Courts and tribunals may also consider relevant legislation, which will differ from state to state.

However, the law outside of legislation is the same throughout every state of Australia – this is the common law. Where legislation is silent on an issue, the common law will apply – that is, the law that has evolved through decisions of courts and tribunals.

The common law says that every competent person has the right to decide what happens to his/her body, and to have that decision respected. Common law principles of consent apply when deciding if a common law advance care plan was validly made.

All advance care directives made at common law must be considered by a health practitioner when they are making a medical treatment decision on your behalf. This is the case in all states and territories in Australia, although there may be some limitations in some states/territories when it comes to certain types of treatment, or treatment for mental illness.

UNDERSTANDING POWER OF ATTORNEY

One of the key steps when creating an Advance Care Plan is naming your Substitute Decision Maker. In some states/territories you may be entitled to appoint more than one. This is a general term which describes someone who has the legal power to make decisions on your behalf when you are no longer able to do so and is also referred to as an Enduring Power of Attorney (EPOA).

POA VERSUS EPOA

The more commonly known Power of Attorney and Enduring Power of Attorney are in fact two different documents and it is important to understand the differences in regards to your Advance Care Plan.

Power of Attorney is used to appoint someone to make financial decisions and manage assets on your behalf if you are unable to do so due to illness, an accident or your absence -for example if you are going to be in hospital or overseas for an extended period of time and will not be able to undertake actions such as paying bills, selling property etc.

It stops having effect when you, the person who appointed someone else to manage your affairs, lose capacity. That is when you can no longer:

- understand the nature and effect of the decisions being made
- freely and voluntarily make decisions
- communicate decisions in some way

The general Power of Attorney is invalid after a person's death.

Enduring Power of Attorney is similar to a Power of Attorney in that you are appointing someone to act on your behalf. However, an Enduring Power of Attorney continues after loss of capacity.

You can nominate at what point you want your EPOA to begin making financial decisions for you – either straight away or at some other date or occasion, such as once you've been deemed as having lost capacity. Their power to make personal decisions only commences when you are deemed as having lost capacity to make decisions for yourself.

When choosing to grant someone Enduring Power of Attorney, it is vital that you understand the nature and effect of this decision, including:

- the consequences of preparing the Enduring Power of Attorney
- that you may specify or limit the power to be given to your attorney, and instruct your attorney about the exercise of the power in the Enduring Power of Attorney
- when the power begins
- that once the power begins your attorney will have full control over the exercise of the power (subject to any terms in the enduring power of attorney
- that you may revoke the Enduring Power of Attorney at any time while you have capacity to do so
- that the power continues even if you lose capacity
- if you lose capacity you are effectively unable to oversee the use of the power.

ENDURING POWER OF ATTORNEY FOR HEALTH MATTERS, OR ENDURING GUARDSHIP

The other role often discussed around end-of-life planning is that of an Enduring Guardian or known in some states as your Enduring Power of Attorney for Health Matters. Complementary to the Enduring Power of Attorney, this is someone you appoint to make lifestyle, health and medical decisions for you when you are not capable of doing this for yourself. Decisions they may make include where you live, what services are provided to you at home and what medical treatment you receive.

Enduring Guardianship, or Enduring Power of Attorney for Health Matters only comes into effect when or if you lose capacity and will only be effective during the period of incapacity – so in many cases it may never be enabled.

It is a good idea to name your Enduring Power of Attorney for Health Matters, or your Enduring Guardian as your Substitute Decision Maker in your Advance Care plan. Unless you make an Advance Care Plan, your wishes and directions for this person are unknown and decisions can be made at their discretion. However, where there is both an Advance Care Plan and an Enduring Guardianship, the wishes expressed in the Advance Care Plan override the opinions of the Enduring Guardian.

CHALLENGING AN ACP

The biggest concern of most people when they are unable to make decisions for themselves is trusting that the people who know and love them best will make the best choices. Just like a will can be challenged, so too can an Advance Care Directive.

When might someone challenge an ACP?

A person might challenge your Advance Care Plan if they do not believe it was validly made – for example, if:

- They believe you did not have decision-making capacity at the time of making it;
- They believe you did not understand the nature of the decision/s;
- They believe you did not understand the risks or consequences of your decision/s;
- Circumstances have changed such that your Advance Care Plan no longer appears to apply, or circumstances have arisen which you were unlikely to (or could not have) anticipated at the time of making the Advance Care Plan;
- They suspect the Advance Care Plan is fraudulent;
- They are concerned your Advance Care Plan may not have been made freely or voluntarily, or that it may have been made with coercion;
- The Advance Care Plan is unclear or cannot be understood;
- The Advance Care Plan is contrary to other wishes you have previously expressed.

What happens if someone challenges an ACP?

If your advance care plan were to be challenged by someone, whether it should be complied with would ultimately be decided by a court or tribunal (depending on the state/territory). The court or tribunal would look at the content of your Advance Care Plan and the circumstances under which it was made. In doing so, they would apply principles of common law and look at how similar cases were previously decided.

Note that in addition to the common law, a court or tribunal would also consider state/territory legislation relating to statutory advance care plans (which differs state by state).

How best to avoid or discourage someone from challenging an ACP?

If the people you trust know about (and understand) your advance care plan ahead of time, they are less likely to challenge it later.

You are encouraged to review and revise it regularly (after any major change in your life - marriage, childbirth, illness etc) and to ensure you share it with those trusted people when you do. The proof of ongoing discussions around your plan with those trusted with a copy - particularly if you have made any important amendments such as your opinion toward life support has utterly changed - will also give a court or tribunal additional confidence that your advance care plan is a true statement of your wishes.