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ADVANCE CARE DIRECTIVES

THE BLUE MOUNTAINS' LEADING WILLS & ESTATES LAW FIRM

PROTECTING WHAT MATTERS MOST

ADVANCE CARE DIRECTIVES

1. WHAT IS IT, AND WHERE DID IT COME FROM?

Advanced Care Directives originated in the USA in the 1960s and were called 'Living Wills'. At least since the NSWHealth's publication "Using Advanced Care Directives" in 2004, it's been officially (and almost uniformly) called an Advance Care Directive ("ACD") in NSW. This is a surprisingly apt name as it succinctly describes the document's function: a Directive (ie binding decision), in Advance of the situation occurring, about Care (which is a wider concept than health).

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2. IS IT LEGALLY BINDING?

Yes. In 2009 the NSW Supreme Court confirmed that ACDs are legally binding.

3. IS THERE A FORM?

In NSW there is no form for an ACD. An ACD can take any form. Nevertheless, there are some contents which it is important to include:

3.1 the ACD should be in writing (or some other non-alterable and easily verifiable form). This will remove doubt about the decision that is made.

3.2 the direction should be specific and unequivocal. There are, unfortunately, many examples of vague and unsatisfactory expressions which should be avoided.

3.3 if it is in writing, the maker of the ACD should sign the document to authenticate it as belonging to the maker. Some other ways of making an ACD (such as a video, DVD, CD, tape or cassette) may provide other ways to easily authenticate the maker of the directive.

3.4 if it is in writing, the maker's signature should be witnessed. This will help establish the maker's mental capacity at the time the document was signed, and the voluntariness of the directive.

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4. WHAT SHOULD *THE ACD CONTAIN?*

There are no limits or controls on the contents of an ACD. The general concept is that it directs important care (including health and welfare issues) for the maker. However, the contents that I recommend are:

1. state the persons to whom the direction is addressed (and to whom it should therefore be distributed). This list will often include:

   - the enduring guardian,
   - members of the maker's family,
   - the maker's usual medical practitioner,
   - any hospital at which the maker is a patient,
   - any care facility where the maker resides, and
   - anyone else involved with the person's care, health or welfare.

2. specify the circumstances where the maker wants the direction(s) to apply.
   This is referred to on the next page.

3. state the direction that the maker wants for his/her care if the specified circumstances exist.
   This is referred to on the next page.

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5. IN WHAT CIRCUMSTANCES SHOULD AN ACD APPLY?

An ACD is designed to speak for its maker when the maker is unable to communicate his or her wishes directly.

As a result, this is usually one of the essential contents for an ACD.

The other circumstances in which an ACD will operate will depend on the direction(s) contained in the ACD.

For instance, the circumstances in which an ACD operates could be:

- when the maker's death is imminent, and
- 2 medical practitioners independently conclude that the maker's condition is terminal, incurable and irreversible.

6. WHAT TYPE OF DIRECTIONS CAN BE GIVEN?

To be enforceable, directions must be negative. Most directions focus on wishes against medical treatment, such as:

- blood transfusion
- cardiopulmonary resuscitation
- external feeding (of which there are different levels such as oral feeding, supplemental feeding, intravenous feeding or tube feeding)
- antibiotics
- artificial breathing/mechanical ventilation
- hydration
- pain relief medication

or levels of care (including palliative care, limited care, surgical care, intensive care or other specific care).

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7. HOW OFTEN SHOULD THE ACD BE REVIEWED?

A history of regular reviews of the ACD can help resist the argument that an ACD, made some years before it is needed, no longer represents the maker's wishes. The NSWHealth Guidelines recommend an annual review. A former President of the Guardianship Tribunal suggested a review every 3 years.

It should also be reviewed if there are advances in medical treatment, or development of relevant technology. It should be reviewed if there are changes in the maker's medical condition, health or attitude.

8. TO WHOM SHOULD A COPY BE GIVEN?

A copy of the ACD should be given to all persons or organisations to whom the ACD is directed. A suggested list appears at 4 [1] above. I suggest that a certified copy be given. This is a copy bearing a certificate that it is a true copy of the original.

9. WHAT SHOULD YOU DO WITH THE ORIGINAL?

The original ACD should be stored safely so that further copies can be easily obtained if the copies are lost or damaged, or further copies are required. It is probably a good idea to store it with your will, enduring guardian appointment and other important documents.

GET
IN TOUCH

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