

# Article

## WILLS & ESTATES



## Advance Care Directives

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Many people will have heard of documents such as Medical Powers of Attorney, Anticipatory Directions and Powers of Guardianship - the purpose of which was to appoint another person to make decisions for you in relation to medical treatment and/or other care or personal arrangements, particularly in the event of becoming aged or infirm and/or losing the ability to make these sorts of decisions for whatever reason.

Alternative arrangements for these sorts of things are now made pursuant to the Advance Care Directives Act 2013 (SA) provisions, which came into force on 1st July 2014.

### Purpose of the legislation

The Advance Care Directives Act 2013 sets out the following objects [s 9]:

- to enable competent adults to give directions about their future health care, residential and accommodation arrangements and personal affairs;
- to enable competent adults to express their wishes and values in respect of health care, residential and accommodation arrangements and personal affairs, including by specifying outcomes or interventions that they wish to avoid;
- to enable competent adults to allow decisions about their future health care, residential and accommodation arrangements, and personal affairs to be made by another person on their behalf;

- to ensure, as far as is reasonably practicable and appropriate, that health care that is provided to a person who has given an advance care directive accords with the person's directions, wishes and values;
- to ensure that the directions, wishes and values of a person who has given an advance care directive are considered in dealing with the person's residential and accommodation arrangements and personal affairs;
- to protect health practitioners and others, giving effect to the directions, wishes and values of a person who has given an advance care directive; and
- to provide mechanisms for the resolution of disputes relating to decisions made on behalf of those who have given an advance care directive.

### Practical matters

Section 11 of the Advance Care Directives Act 2013 (SA) provides the ability to make an advance care directive. An advance care directive covers personal matters: future health care, residential and accommodation matters and personal affairs [s 11(3) Advance Care Directives Act 2013]. Thus, an advance care directive is different from an enduring power of attorney, which covers the management only of a person's financial affairs.

A person can only make an advance care directive for himself or herself [s 11(4)]. A person cannot make an advance care directive on behalf of another person, even if they are the guardian or parent of that person.

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Both types of advance directives (enduring powers of attorney and advance care directives) are arrangements that allow a person to plan ahead, thereby providing a possible alternative to the involvement of the South Australian Civil and Administrative Tribunal (SACAT) at a later stage in a person's life should they become legally incapacitated.

Another key difference between an enduring power of attorney and an advance care directive relates to the need to appoint a substitute decision-maker. An enduring power of attorney document must appoint someone to make decisions for the donor of the power. However, there is no need to appoint a substitute decision-maker when making an advance care directive. The directive may simply be used to set out a person's wishes in relation to future health care, residential and accommodation matters and their personal affairs.

### Advance Care Directive requirements

A competent adult may make an Advance Care Directive – Advance Care Directive Act 2013 (SA). These are often prepared at the same time as a Will, for obvious reasons.

An Advance Care Directive requires completion of a specific form – which can be done as long as the person has legal capacity, i.e. is legally “competent”.

To be “competent” to make an Advance Care Directive, a person must understand what an Advance Care Directive is and the consequences of giving one.

Being physically incapacitated, e.g. being paralysed and unable to sign documents, does not mean that a person is necessarily not competent. The person may still be able to understand the document and its implications. If a person is able to communicate this in some way, then the person can be considered competent.

If there is any question about a person's competence, however, it is best to obtain a written medical opinion.

A person who induces another to make an Advance Care Directive using dishonesty or undue influence is guilty of an offence, the maximum penalty for which is imprisonment for 10 years.

### Documentation

There is now one Advance Care Directive Form for future health care, residential, accommodation and

personal matters, which will replace the existing Enduring Power of Guardianship, Medical Power of Attorney and Anticipatory Direction.

### Witnessing an Advance Care Directive form

When a person has completed an ACD form, he/she must sign the form in the presence of a suitable witness.

When a Substitute Decision Maker is being appointed, the ACD must not be witnessed until each Substitute Decision Maker to be appointed has completed and signed the relevant part of the form.

Before the person signs the form, the witness must give the person an “Advance Care Directive Information Statement”. The witness must also explain to the person the legal effects of giving an ACD. Giving the person an “ACD Information Statement” is taken to be an explanation of the legal effects of the document, but there is a further obligation on the witness to form an opinion that the person actually understands the information and explanation and does not appear to be acting under any form of duress or coercion. Accordingly, the witness should have a conversation with the person about the proposed ACD. If there is any doubt about the existence of duress or coercion – or a person's ability to understand the nature and effects of the ACD, the witness should not sign the form.

As making an ACD revokes any previous ACD, the witness should also ask the person whether he/she has previously made an ACD and confirm that the person understands the consequence of revoking the existing ACD.

A person cannot witness an ACD if he/she:

- is appointed as a Substitute Decision Maker under the ACD;
- has a direct or indirect interest in the estate of the person giving the ACD;
- is a health practitioner responsible (solely or with others) for the health care of the person giving the ACD; and
- occupies a position of authority in a hospital, hospice, nursing home or another facility in which the person giving the ACD resides.

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## Recognition of interstate Advance Care Directives

Documents equivalent to the South Australian Advance Care Directive that have been made under interstate law are recognised in South Australia and treated as if they were advance care directives made under the Advance Care Directives Act 2013 (SA) [s 33(2)(a), reg 12].

However, an interstate advance care directive can only be revoked in the manner allowed for under the relevant interstate law. Apart from revocation, the Advance Care Directives Act 2013 (SA) applies to an interstate advance care directive [s 33(2)(b)]. Thus, even if certain provisions are acceptable under interstate law, if they are not allowed to be included under South Australian law, they are not valid.

ACDs are important documents, and it is a very good idea to obtain legal advice and assistance throughout the process to ensure that if/when the Advance Care Directive is needed, no problems arise.



[MORE INFO](#)

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