



Advance Health Directives

Directions to your medical practitioner about future medical treatment

1. What is an Advance Health Directive?

An Advance Health Directive (**AHD**) (which is colloquially known as a “Living Will”) is a legal document setting out a person’s preferences for future medical, surgical or dental treatment and other health care, such as palliative care and life-sustaining measures.

A person must have full legal capacity to make an AHD. That is, they must be capable of understanding the nature and effect of their AHD (their choices, and the consequences of their decisions), and their decision-making ability must not be impaired by reason of factors including but not limited to illness, disability, injury, the effects of medication, drugs, alcohol or ‘feebleness of the mind’. If the person’s requisite capacity is found to have been lacking at the time the AHD was made then the directions contained in the AHD can be disregarded on that basis.

Although it is not necessary to have medical or legal advice before making an AHD, it is highly recommended that a person receive both of these before embarking on the preparation of an AHD.

2. What if your AHD is invalid? Who will be asked to make treatment decisions on your behalf?

On 15 February 2010, the *Guardianship and Administration Act 1990 (WA)* (**Act**) was amended to legislate on AHDs and the hierarchy of decision-makers.

If a person elects not to make an AHD and is unable to make medical decisions themselves, and if they have not appointed an enduring guardian or guardian (with authority to make medical decisions), then section 110ZD of Act sets out the following hierarchy of people who will be responsible for decision making on behalf of the person who is unable to make those decisions, or is lacking capacity to make those decisions:

spouse or de-facto;

adult son or daughter;

parent;

sibling;

primary unpaid caregiver;

other person with a close personal relationship.

3. The operation of an AHD and how it applies in practice

A treatment decision contained in an AHD operates if at the time the treatment is required, the maker of the directive is unable to make reasonable judgments themselves in respect of that treatment. The AHD is as effective as if the maker of the directive were of full legal capacity and personally able to make the treatment decisions.



AHDs can:

- (a) include treatment measures designed to prolong life;
- (b) stipulate medical treatment which may be influenced by religious beliefs, or other values and beliefs;
- (c) identify the extent of the treatment a person is willing to undergo when their condition is incurable; and
- (d) contain directions to refuse consent to medical treatments or interventions.

4. The impact of an AHD

If an AHD is made by a capable adult, is clear and unambiguous, and extends to the situation at hand, it must be respected by medical practitioners. However, an AHD cannot be used to authorise a medical practitioner to take active steps to unnaturally end life.

Notwithstanding any contrary instructions contained in an AHD, medical practitioners can administer treatment in certain limited circumstances including:

- (a) there have been significant advances in medical treatment which could not have been foreseen by the maker of the AHD at that time, and a reasonable person with knowledge of the advances would now change their mind about the treatment decision; and
- (b) the treatment is necessary to save the life of a viable unborn child.

Section 259 of the Criminal Code of Western Australia has been amended to provide an exemption in certain circumstances, from criminal responsibility for the administration in good faith (and with reasonable care and skill) of surgical or medical treatment to another person. However, if those special circumstances do not exist, it may be considered a battery to administer to a person the kind of medical treatment prohibited in their AHD.

A case which dealt with a patient's refusal to accept a blood transfusion which was ultimately going to result in the death of the patient was: *Hunter and New England Area Health Service v A* [2009] NSWSC 761. In that case, the Court accepted that the directions made in the AHD by the patient were binding on the hospital.

We consider that an AHD should always be made in consultation with the maker's medical practitioner. The medical practitioner will be able to advise as to the appropriate medical terminology to describe the particular medical treatment being referred to in the AHD. This is particularly important because:

- (a) the terms of any AHD must be respected whether or not the person making the AHD was medically informed of the consequences when the AHD was written. (Section 110Q(1)(b) of the Act states that an AHD is not valid unless the maker is 'encouraged' to seek legal or medical advice. However, section 110Q(2) of the Act expressly states that the validity of an AHD is not affected by the failure of the maker to comply with section 110Q(1)(b)); and
- (b) it helps to avoid confusion and uncertainty during what is generally a stressful period of time.



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If you need advice regarding any aspect of your estate planning, including making an AHD or updating your Will, please contact a member of Murfett Legal's Estate Planning team.

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