

# **Who will make decisions for your child when they turn 18? Planning for yourself and your adult child**

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# What do we need to look at?

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- Looking at how decisions will be made for your child:
  - after they turn 18
  - have a decision-making disability
- Parents planning for themselves and their future decision making.

# Benefits of planning for the future

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- Understand what (if anything) changes with decision-making when your child turns 18.
- Parents can choose how they want their financial, lifestyle and treatment decisions to be made if they lose capacity.
- Provides protection from exploitation.
- Provide information to family/friends to assist them if you are unable to provide ongoing support.

# When your child turns 18

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- Under the law they are an adult.
- Some agencies may have different requirements when talking to others on behalf of the person.
- This **may** mean parents need to consider guardianship/administration.
- The need for a guardian/administrator will be specific to individual circumstances.

# Legislation

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## The *Guardianship and Administration Act 1990*:

- enables substitute decision-makers to be appointed to make decisions in the **best interests** of adults with a decision-making disability, through:
  - the appointment of a **guardian** and/or **administrator**, by the State Administrative Tribunal (SAT)
  - individuals making an **Enduring Power of Attorney** (EPA) and/or an **Enduring Power of Guardianship** (EPG).

# Government agencies

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- **Office of the Public Advocate:**
  - ✓ investigates and provides reports to the Tribunal
  - ✓ can be appointed guardian of last resort.
- **Public Trustee's Office:**
  - ✓ can be appointed administrator of last resort
  - ✓ provides support to private administrators.
- **State Administrative Tribunal:**
  - ✓ organises all aspects of hearings in relation to guardianship and administration.

# Principles of the Legislation

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- Best interests.
  - Presumption of competence.
  - Least restrictive alternative.
  - Limited versus plenary.
  - Respect for the person's wishes.
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# **Informal decision-making**

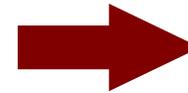
**(where a person has lost capacity)**

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- “Least restrictive alternative” applies – where informal processes work in the person’s best interests, decisions can be made informally.
- If informal processes are not working an application can be made to the State Administrative Tribunal (SAT).

# Hierarchy of Treatment Decision Makers (non-urgent)

**Advance Health Directive (AHD)**



Decisions must be made in accordance with the AHD unless circumstances have changed or could not have been foreseen by the maker.

Where an AHD does not exist or does not cover the treatment decision required, the health professional must obtain a decision for non-urgent treatment from the first person in the hierarchy who is 18 or older and willing and reasonably available to make a decision.

**Enduring Guardian** with authority

**Guardian** with authority

**Spouse or de facto partner**

**Adult son or daughter**

**Parent**

**Sibling**

**Primary unpaid caregiver**

**Other person with close personal relationship**

# Lifestyle decisions

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- There is no conflict about decisions to be made.
  - The person agrees with the proposed decision – and may have the **ability to contribute their views** in an informed way.
  - Professional assessments.
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# Financial decisions

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- If person has capacity:
  - It is possible to establish processes with individual agencies (for example, Centrelink nominee, joint signatory at bank).
  - They can appoint an Attorney using an Enduring Power of Attorney (EPA).

# What happens if the informal processes do not work?

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# Substitute decision-makers appointed by SAT

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- Guardian:
  - personal, lifestyle and treatment decisions
  - for example: where a person lives, who they have contact with, what services they receive, what medical treatment they receive.
- Administrator:
  - financial and property decisions
  - for example: access income and pay expenses, sale/lease of property, investments.

# When you may need to apply for a guardianship/administration order

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- there is no-one in the hierarchy
- ethically contentious decisions or treatment
- conflicting opinions as to person's needs
- proposed represented person objects to the decisions being made – personal/financial
- conflict that cannot be resolved between service providers or friends/family about what is in the person's best interest.
- concerns about financial exploitation/vulnerability

# Thinking about yourself

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# Personal planning tools (adults with full capacity)

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- **Enduring Power of Attorney (EPA):**  
Enables you to appoint an **attorney** to make financial and property decisions on your behalf. You choose when the power will come into effect.
- **Enduring Power of Guardianship (EPG):**  
Enables you to appoint an **enduring guardian** to make personal, lifestyle and treatment decisions on your behalf in the event you lose capacity to make such decisions for yourself.
- **Advance Health Directive (AHD):**  
Enables you to make decisions about your future medical treatment and health care, including treatment you would/would not want to receive in certain circumstances.

# The 3 tools summarised

An EPG is complementary to an EPA

## EPA

- financial matters
- appoint attorney
- can operate while person has capacity

## AHD

- limited to treatment decisions
- only operates on loss of capacity
- AHD has priority over decisions of enduring guardian

## EPG

- personal, lifestyle and treatment matters
- appoint enduring guardian
- only operates on loss of capacity

# Personal choice in planning for the future

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- It is up to each person to decide if they want to make an EPA, an EPG and/or an AHD.
- No one can make an EPA, EPG or AHD for someone else – or force someone to make one.
- If a person has lost capacity they cannot make these powers – an application may be made to the State Administrative Tribunal (SAT), *we will discuss this later.*

# Benefits of making the powers

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- You choose who you want to make decisions.
- You can provide some directions about your views and wishes.
- You can discuss your choices with family:
  - they are aware and can support your choices
  - less chance of conflict.

# Making an EPA, EPG and AHD

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- The form must meet legal requirements – *forms are available from the websites.*
- All parties must:
  - ✓ have full legal capacity
  - ✓ be 18 years of age or older
  - ✓ complete the form correctly – *instructions in the booklets, downloadable from the websites*
  - ✓ sign the form
  - ✓ have their signature witnessed appropriately.

# Witnessing requirements

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- Witnesses:
  - ✓ must be 18 years of age or older
  - ✓ **cannot be** the person making the power or the person being appointed
  - ✓ **at least one** witness must be in the list under the *Oaths, Affidavits and Statutory Declarations Act 2005*
  - ✓ independent witnesses recommended.

# Does a spouse have authority?

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- An attorney and an enduring guardian assume responsibility over all other parties.
- If a person wants to make an EPA and/or an EPG and they want their spouse to make decisions for them if they lose capacity, they should:
  - ✓ appoint their spouse as their attorney/enduring guardian
  - ✓ appoint another person as their substitute attorney/substitute enduring guardian.

# Enduring guardian: rights and responsibilities

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- Can only make decisions when the appointor has lost capacity.
- Plenary or limited powers - determined at the time the EPG is made (EPG Guide page 11).
- Must act in appointor's 'best interests' (EPG Guide page 23).
- Enduring guardian should try to follow any directions or circumstances included in the EPG (EPG Guide page 18).

# **Attorney: Rights and responsibilities**

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- Keep accurate records and accounts of all dealings and transactions.
- Follow any conditions or restrictions.
- Apply to the State Administrative Tribunal:
  - if unable to continue as attorney, once donor has lost capacity.
  - if unsure about the extent of their role as attorney.

# Advance Health Directives (AHD)

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- Enables adults to state their decisions about what treatment they would/would not want to receive in particular circumstances (known as a “**treatment decision**”).
- As long as the Advance Health Directive (AHD) has been completed correctly and is valid, it must be followed by the treating health professional.

# Revocation

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- Act is silent on the revocation of all three powers (EPG/EPA/AHD).
- The person can only revoke any of the powers while they have capacity (to protect against coercion).
- Revocation in writing recommended (and attach a copy of revocation to new EPG/EPA/AHD).

# Role of the State Administrative Tribunal

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- A person with a 'proper interest' can apply to the SAT in relation to EPGs/EPAs/AHDs.
- SAT has a range of powers in relation to EPGs/EPAs/AHDs.
  - ✓ Such as making an order recognising an interstate instrument.
- Key role: ensure EPG/EPA operating in persons best interests.

# Considerations after today?

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- Do you want/need to start planning for the future?
  - for yourself or your (adult) child
- What decision-making processes will be appropriate?
- Who would you want to appoint – if making an EPG/EPA?

# For more information

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- Advance Health Directives
  - ✓ T: (08) 9222 2300
  - ✓ I: [www.health.wa.gov.au/advancehealthdirective](http://www.health.wa.gov.au/advancehealthdirective)
  - ✓ E: [advancehealthdirective@health.wa.gov.au](mailto:advancehealthdirective@health.wa.gov.au)
- Office of the Public Advocate:
  - ✓ Telephone Advisory Service: 1300 858 455
  - ✓ I: [www.publicadvocate.wa.gov.au](http://www.publicadvocate.wa.gov.au)
  - ✓ E: [opa@justice.wa.gov.au](mailto:opa@justice.wa.gov.au)