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?

- 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

- 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

• 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

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

• **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

- Best interests.
- Presumption of competence.
- Least restrictive alternative.
- Limited versus plenary.
- Respect for the person's wishes.
Informal decision-making
(where a person has lost capacity)

• “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)

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

1. **Advance Health Directive (AHD)**
   - 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.

2. **Enduring Guardian with authority**
   - Spouse or de facto partner

3. **Guardian with authority**
   - Adult son or daughter

4. Parent

5. Sibling

6. Primary unpaid caregiver

7. Other person with close personal relationship
Lifestyle decisions

• 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.
Financial decisions

- 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?
Substitute decision-makers appointed by SAT

- **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

• 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
**Personal planning tools**
(adults with full capacity)

- **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

<table>
<thead>
<tr>
<th>EPA</th>
<th>AHD</th>
<th>EPG</th>
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<tbody>
<tr>
<td>• financial matters</td>
<td>• limited to treatment decisions</td>
<td>• personal, lifestyle and treatment matters</td>
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<tr>
<td>• appoint attorney</td>
<td>• only operates on loss of capacity</td>
<td>• appoint enduring guardian</td>
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<tr>
<td>• can operate while person has capacity</td>
<td>• AHD has priority over decisions of enduring guardian</td>
<td>• only operates on loss of capacity</td>
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An EPG is complementary to an EPA
Personal choice in planning for the future

• 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

- 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

• 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

• 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?

- 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

- 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

- 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)

- 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

• 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

• 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?

- 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

- Advance Health Directives
  - T: (08) 9222 2300
  - I: www.health.wa.gov.au/advancehealthdirective
  - E: advancehealthdirective@health.wa.gov.au

- Office of the Public Advocate:
  - Telephone Advisory Service: 1300 858 455
  - I: www.publicadvocate.wa.gov.au
  - E: opa@justice.wa.gov.au