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Part 2 of the Acts Amendment (Consent to Medical Treatment) Act 2008 (WA)

On 8 January 2010, Part 2 of the *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA) ("AACMTA") other than parts of section 11 (namely ss110RA, 110ZAA, 110ZAB, 110ZAC) and section 12 (ie registration related provisions) was proclaimed to come into operation on 15 February 2010. The newly proclaimed provisions are the first legislative steps in Western Australia to govern the making of future treatment decisions in circumstances where a person loses the capacity to make such decisions regarding his or her own medical treatment.

The AACMTA makes substantial amendments to the *Guardianship and Administration Act 1990* (WA) ("GAA")(through Part 2), minor amendments to the *Civil Liability Act 2002* (WA) (through Part 3) and minor amendments to the Criminal Code (through Part 4). The focus of this article will be on the segments of Part 2 which have only recently been proclaimed.

Part 2 contains provisions which deal with 3 scenarios that may arise in the realm of medical treatment decisions where the patient has lost the capacity to make decisions regarding his or her own medical treatment:

(a) where the patient has made an enduring power of guardianship;
(b) where the patient has made an advance health directive;
(c) where the patient had not earlier made an enduring power of guardianship or an advance health directive, and there is no guardian appointed by SAT under Part 4 GAA.

MAKING AN ENDURING POWER OF GUARDIANSHIP

Part 9A GAA governs the making and operation of enduring powers of guardianship.

Anyone can now make an enduring power of guardianship ("EPG") provided he or she is 18 years old and has full legal capacity.[1] An EPG involves a person appointing another person as his or her enduring guardian, or two or more persons as his or her joint enduring guardians.[2] It is also possible for a person to appoint a substitute enduring guardian who may become the enduring guardian in the circumstances specified in the EPG.[3] Similarly, a person may only be appointed an enduring guardian if he or she is 18 years old and has full legal capacity.[4]

[1] new section 110B GAA
[2] new section 110B GAA
[3] new section 110C GAA
[4] new section 110D GAA

Generally, an enduring guardian may make decisions under the EPG when the person who so appointed him or her is unable to make reasonable judgments in relation to his or her person.[5] The functions of the person appointed enduring guardian may be as wide as a plenary guardian appointed under section 43 GAA or alternatively, may be limited by the terms of the EPG itself.[6] Obviously, an EPG could encompass treatment decisions relating to the person who made the enduring power of guardianship.

For an EPG to be valid it must comply with the formal requirements specified in the new section 110E. This section deals largely with the form upon which the EPG is written, signature requirements of the person making the enduring power of guardianship and the person accepting the enduring power of guardianship, and requirements of the witnesses to the signing of the EPG.

The new provisions empower the State Administrative Tribunal to make declarations concerning the validity[7] and construction[8] of an EPG, as well as the power to revoke or vary its terms.[9] The State Administrative Tribunal also has the power to determine whether the person who made the EPG is unable to make reasonable judgments in respect of matters relating to his or her person[10] and thereby trigger the operation of the EPG. The State Administrative Tribunal may also recognise similar instruments (in form and substance) to enduring powers of guardianship where such instruments have been created outside Western Australia.[11]

MAKING AN ADVANCE HEALTH DIRECTIVE

Part 9B GAA governs the making and operation of advance health directives.

Anyone can now make an advance health directive ("AHD") provided he or she is 18 years old and has full legal capacity.[12] An AHD is in essence an instrument that outlines the maker's decision to consent to or refuse consent to the commencement or continuation of treatment, whether it be medical, surgical, dental or other health care treatment (including a life sustaining measure and palliative care).

A treatment decision outlined in an AHD applies when the maker of the AHD is unable to make reasonable judgments in respect of that specific treatment.[13] The treatment decision specified in the AHD is treated as if it had been made by the maker of the AHD at that time and as if the maker were of full legal capacity at that time.[14] A treatment decision in an AHD, however, will not apply if at the relevant time, circumstances exist or have arisen that were not reasonably anticipated by the person at the time of the making of the AHD and would have caused a reasonable person in the maker's position to have changed his or her mind about the treatment decision made[15] (ie. advances in technology). The new section 110S(4) outlines the relevant factors to be considered in determining whether a change in circumstances would alter the operation of the AHD. Section 110S(5) then lists a number of people who generally may be consulted to determine what the expectations of the maker of the AHD may have been at the time the document was made, and what his or her attitude would have been when the change in circumstances arose.

If the maker of an AHD subsequently makes an EPG, a treatment decision in the AHD will not automatically be revoked.[16] However, a treatment decision in an AHD will be revoked if the maker of the AHD has changed his or her mind about the treatment decision after the making of the AHD.[17] Making a subsequent EPG does not necessarily signify that the maker of the earlier AHD has changed his or her mind about the treatment decision.[18]

For an AHD to be valid it must comply with the formal requirements specified in section 110Q. This section deals largely with the form upon which the AHD is written, signature requirements of the person making the AHD and the requirements of the witnesses to the signing of the

[5] new section 110F GAA
[6] new section 110G GAA
[7] new section 110K GAA
[8] new section 110M GAA
[9] new section 110N GAA
[10] new section 110L GAA
[11] new section 110O GAA
[12] new section 110P GAA

[13] new section 110S(1)(a) GAA
[14] new section 110S(1)(b) GAA
[15] new section 110S(3) GAA
[16] new section 110T(a) GAA
[17] new section 110S(6) GAA
[18] section 110T(b) GAA

AHD. The maker of the AHD is also "encouraged" to seek legal or medical advice,[19] however failure to do so does not render the AHD invalid.[20] The maker of the AHD may indicate in the instrument whether he or she obtained such advice and if so, from whom.[21]

Furthermore, a treatment decision specified in an AHD will only be valid if it was made voluntarily, and not as a result of an inducement or coercion.[22] In addition, the maker must have understood the nature of the treatment decision in question and the consequences of making that treatment decision at the time the AHD was made.[23]

Section 110ZB preserves the common law position so that a person can still make a future treatment decision other than by way of an AHD.

The new provisions empower the State Administrative Tribunal to make declarations concerning the validity[24], construction[25] and revocation[26] of an AHD and the treatment decisions contained therein. Furthermore, the State Administrative Tribunal has the power to determine whether the person who made the AHD is unable to make reasonable judgments in respect of the treatment to which a treatment decision in the directive applies[27] and thereby trigger the operation of the AHD. The State Administrative Tribunal may also recognise similar instruments (in form and substance) to AHDs where such instruments have been created outside Western Australia.[28]

SITUATION WHERE THERE IS NO ENDURING POWER OF GUARDIANSHIP, NO ADVANCE HEALTH DIRECTIVE AND NO SAT APPOINTED GUARDIAN

Part 9C governs the situation where a patient in need of medical treatment does not have full legal capacity to make reasonable judgments in relation to any proposed medical treatment, and there is no EPG or AHD in place, nor a guardian appointed by the State Administrative Tribunal to assist or make the decision. In such a situation, the new provisions provide that the "person responsible for the patient" may make the relevant treatment decision provided he or she is at least 18 years old, is reasonably available and is willing to make the treatment decision in question.[29]

As to who is the "person responsible for the patient", section 110ZD(3) provides a list of persons who may be considered to be the "person responsible for the patient". Priority is given in order of the persons listed in the new section 110ZD(3), namely the patient's spouse or de facto partner who lives with the patient, the patient's nearest relative who maintains a close personal relationship with the patient, the patient's primary provider of care and support but who is not remunerated for providing such care and support, and any person who maintains a close personal relationship with the patient.[30]

There are two restrictions imposed by the legislation on the "person responsible for the patient" when making a treatment decision for the patient. First, the "person responsible for the patient" cannot consent to the sterilisation of the patient[31] and secondly, he or she must act according to his or her opinion of the patient's best interests.[32]

The new provisions empower the State Administrative Tribunal to make declarations as to the capacity of a person to make reasonable judgments in respect of the treatment proposed to be provided to him or her, and as to who is the "person responsible for the patient" and therefore able to make medical treatment decisions in a particular circumstance where the patient is in need of medical treatment but lacks full legal capacity.[33]

PRIORITY OF TREATMENT DECISIONS UNDER THE 3 SCENARIOS

Section 110ZJ outlines the priority to be given to the treatment decisions that may be made in an AHD, by an enduring guardian, by a Tribunal

[19] new section 110Q(1)(b) GAA
[20] new section 110Q(2) GAA
[21] new section 110QA GAA
[22] new section 110R(1) GAA
[23] new section 110R(2) GAA
[24] new section 110W GAA
[25] new section 110Y GAA
[26] new section 110Z GAA
[27] new section 110X GAA
[28] new section 110ZA GAA
[29] new section 110ZD(2) GAA
[30] new section 110ZD(2), (3), (4) GAA
[31] new section 110ZD(7) GAA
[32] new section 110ZD(8) GAA
[33] new section 110ZG(1) GAA

appointed guardian and by a "person responsible for the patient". In essence, where a person lacks full legal capacity at the time that a treatment decision in respect of actual treatment needs to be made, priority is given to the patient through his or her AHD, then to an enduring guardian appointed under an EPG, then to a guardian appointed by the State Administrative Tribunal under the GAA and finally to a "person responsible for the patient".

However, in circumstances where:

(a) urgent medical treatment is required to be administered;
(b) the patient lacks full legal capacity; and
(c) it is not practicable for the health professional to ascertain the existence of an AHD and its contents, or obtain a treatment decision by an enduring guardian or Tribunal appointed guardian or "person responsible for the patient",

the new provisions empower the health professional to provide the treatment necessary to the patient.[34] A similar provision with some modification exists relating to urgent treatment required after an attempted suicide.[35]

The new provisions also provide some protection to the health professional who may administer treatment in "good faith".[36]

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[34] new section 110ZI GAA
[35] new section 110ZIA GAA
[36] for example new section 110ZK GAA