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NEWSLETTER – ISSUE NO. 28 (APRIL 2026)

[Disclaimer – The articles in this newsletter are information only and do not constitute legal, superannuation or financial advice]

Who can make medical treatment decisions?

Determining who has the authority to make medical treatment decisions for another person (child or adult) can be an extremely difficult matter to navigate. There are many variables to consider.

Often the answer varies according to the type of medical decision to be made, the level of capacity the "patient" has to consent, and whether they are a child or an adult in the eyes of the law.

Who has authority to make medical decisions for a child under 18 years?

Children under the age of 18 years (minors) are not "presumed" by law to have decision making capacity.

The MTDM for a child is the child's parents/guardian or other person with parental responsibility, who is reasonably available, willing and able to make the medical treatment decisions (see s.55(4) *Medical Treatment Planning & Decisions Act* 2016 (Vic).)

In general, it accepted that parents or the guardian of a child under the age of 14 years makes all medical decisions for them, giving weight to the minor's known preferences and values.

If the child is aged 14 years or over, but is under 18 years, and clearly lacks capacity to make medical decisions, the parents/guardian continue to make the medical decisions for that child. However, the position is less clear where the child over 14 years has some capacity for independent medical decision making.

Under the common law, a doctor may deem a child under 18 years to be able to consent to a relevant medical decision. The child is often referred to as being "Gillick competent" or "a mature minor" if the medical practitioner considers that the child has sufficient understanding to fully grasp:

- The nature of the health issue
- The proposed treatment and consequences; and
- The potential risks and side effects of the treatment.

In the UK case of *Gillick v West Norfolk & Wisbech Area Health Authority* the House of Lords held that the authority of parents to make decisions for their minor children is not absolute, and diminishes with the child's evolving maturity. The case related to the decision of a medical practitioner to prescribe oral contraceptives to a minor patient without parental knowledge or consent.

A GP cannot go against the wishes of a child if they are Gillick competent for a particular medical decision. Additionally, it would be a breach of the child's privacy if the GP discussed his/her medical care with the minor's parents against the minor's express wishes.

Medicare recognises the concept of children as likely being Gillick competent and having a right to privacy from the age of 14 onwards. When a child turns 14 years of age, a parent or guardian's access to the child's Medicare and health records is automatically removed. At the age of 15 years, a child can apply for their own Medicare card.

[Please refer to the Duncan.Legal Newsletter Issue No. 23, dated October 2024 (available on our website) for information on how parent's/guardians for a child with a cognitive disability may continue to have access to Medicare records and My Health Record on that child's behalf over the age of 14 years.]

Capacity is decision specific. A child may have capacity to make some decisions but not others.

If a mature minor and that minor's parents disagree over a medical treatment decision, generally the mature minor's wishes prevail.

In relation to more serious treatments for a child with gender dysphoria, generally the consent of both the child and the parents is required. If there is a dispute, then the matter can only be determined by court order.

There are a number of medical decisions that neither a parent nor child can consent to, that can only be made by Court/VCAT order. These include:

- Treatment causing permanent infertility
- Termination of pregnancy
- Removal of tissue for transplants

[NOTE – A Child cannot appoint a Medical Treatment Decision Maker (MTDM). However, they may make an Advance Care Directive if they have decision making capacity.]

Who has legal authority to make medical decisions for an adult lacking capacity?

The laws relating to who can make decisions around medical treatment for an adult who lacks capacity can be complex. Much depends upon the type of medical decision that has to be made.

Generally, the law sets out an order of who has authority to make medical decisions for an adult:

1. If the adult has previously had capacity and has made an **Advanced Care Plan** ("ACP"), medical practitioners are bound to follow the directives in the ACP.

2. If no ACP exists, but the adult has previously had capacity and in that time has appointed a **medical treatment decision maker** ("MTDM"), the MTDM makes the medical decision if available and willing to make the decision.

3. If there is no ACP and no MTDM appointed, if the adult is under a VCAT Guardianship Order which has a medical treatment power expressly included in the Order, the appointed **VCAT Guardian** makes the medical treatment decision.

4. If there is none of the above in place, the MTDM for an adult is the first of the following persons listed in order who is in a close and continuing relationship with the adult, and who is reasonably available and willing to make the medical decision, see section 55 of the *Medical Treatment Planning and Decisions Act* 2016 (Vic):
    - The **spouse** or **domestic partner** of the person lacking capacity;
    - The **primary carer** of the person lacking capacity;
    - The first of the following, and if more than one person fits the description, then the oldest of those persons:
        - An **adult child** of the person lacking capacity;
        - A **parent** of the person lacking capacity
        - An **adult sibling** of the person lacking capacity.

If there are no persons available to make a medical decision requiring administration of treatment for an adult lacking capacity, a health practitioner may administer the treatment without consent if it is routine treatment.

Routine treatment is defined as anything other than "significant treatment".

"Significant treatment" means any medical treatment that involves any of the following: a significant degree of bodily intrusion, a significant risk to the person, significant side effects, and/or significant distress to the person. This is a subjective assessment that must be undertaken in light of the particular circumstances prevailing.

If the medical treatment required is significant, the health practitioner must seek the consent of the **Public Advocate**, who acts as the person's MTDM.

As with children, there are a number of "special" medical procedures for an adult that cannot take place unless a VCAT order has been obtained. These include:

- Treatments causing permanent infertility;
- Termination of pregnancy;
- Removal of tissue for the purposes of transplantation; and
- Any other prescribed medical treatment under the *Medical Treatment Planning and Decisions Act* 2016 (Vic).

If Duncan.Legal can assist, we are available to provide advice in relation to medical treatment decision making on behalf of a person with a disability. Please do not hesitate to contact us.

Fast tracking communication with Centrelink's SDT Unit

We have recently become aware of a way to fast-track communications with complex assessment officers in the Special Disability Trust Unit at Services Australia.

This has proven very successful in expediting assessments of Eligibility of a Centrelink client to become a Beneficiary of a SDT, as well as other SDT related inquiries.

You will need to have established a MyGov account for your person with a disability.

The process now is to:

1. **Draft a letter** to the Centrelink Special Disability Trust Unit containing your request or query. This can only be done by the person with a disability's Centrelink Nominee.
    a. Ensure that the person's name, date of birth, address and CRN are all included.
    b. Ensure that your details (as Nominee), including your contact details (mobile & email) are also included.
2. **Upload** – navigate to Upload Documents

Note: when uploading your letter to Centrelink, ensure the correct document & form type are specified. Start the process and when the next 2 fields appear, indicate as follows:

a. **"Document type"** – select **'Centrelink Form'**
b. **"Enter the form type or code"** – **select "MODSDT"**

It is important to make sure you select MODSDT as it is the only way to get your letter through to the Centrelink SDT Unit.

If Duncan.Legal can be of assistance in relation to the set up or operation of your Special Disability Trust, please do not hesitate to get in touch.

(This information has been provided & tested by T & E Accounting and we thank them for their guidance).

Ensuring effective succession of significant property gifted to a SDT - Schedule B Forms

When property is gifted to a Special Disability Trust ("SDT ") by a Donor, it available for the Principal Beneficiary of the SDT to use and benefit from for the duration of the SDT. A SDT usually ends at the death of the Principal Beneficiary.

If this property (or part of it) still remains at the end of the SDT, the Donor at the time of gifting can specify to whom the remainder of the property gifted is to pass. This is done by executing a **Schedule B – Nomination of Specified Beneficiary** Form.

A precedent for this Form is found at the end of every SDT Deed, (as it is part of the Model Deed).

Donors often want a significant asset gifted to the SDT (like a house or share portfolio) to pass to other beneficiaries (or their descendants) when the SDT ends. This is particularly so if those beneficiaries will miss out on a greater share of the Donor's estate when he or she dies in order to support the beneficiary with the disability, or certain persons are to be acknowledged for a greater support role in the Principal Beneficiary's care.

If a Donor gifts property to a SDT through the vehicle of their Will, the drafting solicitor should include a completed Schedule B document as part of the Will.

If the property is gifted to the SDT in the Donor's lifetime, it is very important that a Schedule B form is executed at the time the gift is made.

A completed SDT Schedule B Form thereafter becomes a very important succession document, and must be carefully stored with the important SDT documents for the life of the SDT.

Once a Donor subsequently loses mental capacity or dies, a Schedule B form cannot be completed or amended. If a SDT comes to an end and there is no completed Schedule B form on record, the asset will form part of the deceased Principal Beneficary's estate.

Very often, a Principal Beneficary of a SDT lacks the capacity to make a Will. In this circumstance, they die "intestate" (ie. without a Will).

If there are left over SDT assets and there is no Schedule B form to direct where they are to go, the assets will pass to next of kin according to the rules of intestacy. A hierarchy of what relatives would benefit and in what order is set out in the *Administration and Probate Act* 1958 (Vic).

It is important that Donors are aware of intestacy rules of succession when they make the gift to the SDT if there is no Schedule B form completed.

In the course of our legal practice, it is also common to see incorrectly completed Schedule B forms for SDTs, which may result in their invalidity. This becomes a real problem if the Donor is deceased, or is living but no longer competent to amend the Schedule B Form.

If Duncan.Legal can be of assistance in preparing or reviewing any SDT Schedule B forms please do not hesitate to make contact with us.

Do you need SDT Accounting support?

Duncan.Legal is frequently asked whether we can refer new clients to an accountant that can assist with the annual reporting and taxation requirements for a Special Disability Trust (SDT). Such an accountant can be difficult to find!

We recently connected with T & E Accounting - a small two person Brisbane based accounting firm that specialises in SDT accounting and compliance after your SDT has been established.

If you are looking for SDT accounting support, Melanie Costin or Shane Clarke would be delighted to speak with you. *(PTO for T & E's contact details)*

T & E Accounting Pty Ltd
Ph: 1300 082 633
320 Adelaide Street, Brisbane City, QLD 4000 (GPO Box 3042, Brisbane QLD 4001)
Website: https://trustandestate.com.au/
Emails: sclarke@trustandestate.com.au & mcostin@trustandestate.com.au

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Duncan.Legal Webinar Recordings

'Disability Estate Planning' Webinar	**$99.00 *(incl GST)***
'Special Disability Trusts' Webinar	**$99.00 *(incl GST)***
'Supported Decision Making' Webinar	**$99.00 *(incl GST)***

Click to visit our Webinar Shop

And coming soon:

VCAT **Guardianship & Administration** Webinar

- Understanding Guardianship & Administration
- VCAT – who they are & the authority they hold
- VCAT Applications, Hearings, Deliberations & Orders
- Guardianship & Administration Roles, Duties & Breaches
- Reporting Obligations & Duration of Orders

Webinars

In 2026 Duncan.Legal are again presenting our very popular live webinars to a number of specialist schools and disability organisations.

Held usually in the evenings with a start-time of 7pm, we invite you to host an evening packed with information on:

- **Disability Estate Planning** (approx. 1 hour plus question time); or
- **Special Disability Trusts** (approx. 45 mins plus question time); or
- **Supported Decision Making (Vic)** (approx. 45 mins plus question time); or
- **Guardianship & Administration Orders (Vic).**

If your organisation or school would like to book a webinar in 2026, please get in touch.

Estate Planning Audit

Disability Estate Planning can be a complex and daunting undertaking for many families. To assist you to understand the complexities and to provide you with some options, Duncan.Legal offers all clients an Estate Planning (EP) Audit with the **first ½ hour of the first appointment free-of-charge**. This initial appointment can be held in person or via teleconferencing (Zoom).

At the end of the appointment, we can provide you with a written estimate of the cost to update your estate plans (Wills & Powers of Attorney etc). There is no obligation to proceed.

Take the first step in your Estate Planning or update your existing plans to better reflect your family's situation! To arrange your EP Audit, contact Lee on 9077 7731 or email leesmart@duncanlegal.com.au

Scan this **QR code** to:

- **Request more information** on any topic in this newsletter
- **Ask to be placed on the newsletter mailing list**
- **Book an appointment** or
- **Request a call-back**

We will get back to you as soon as possible.

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