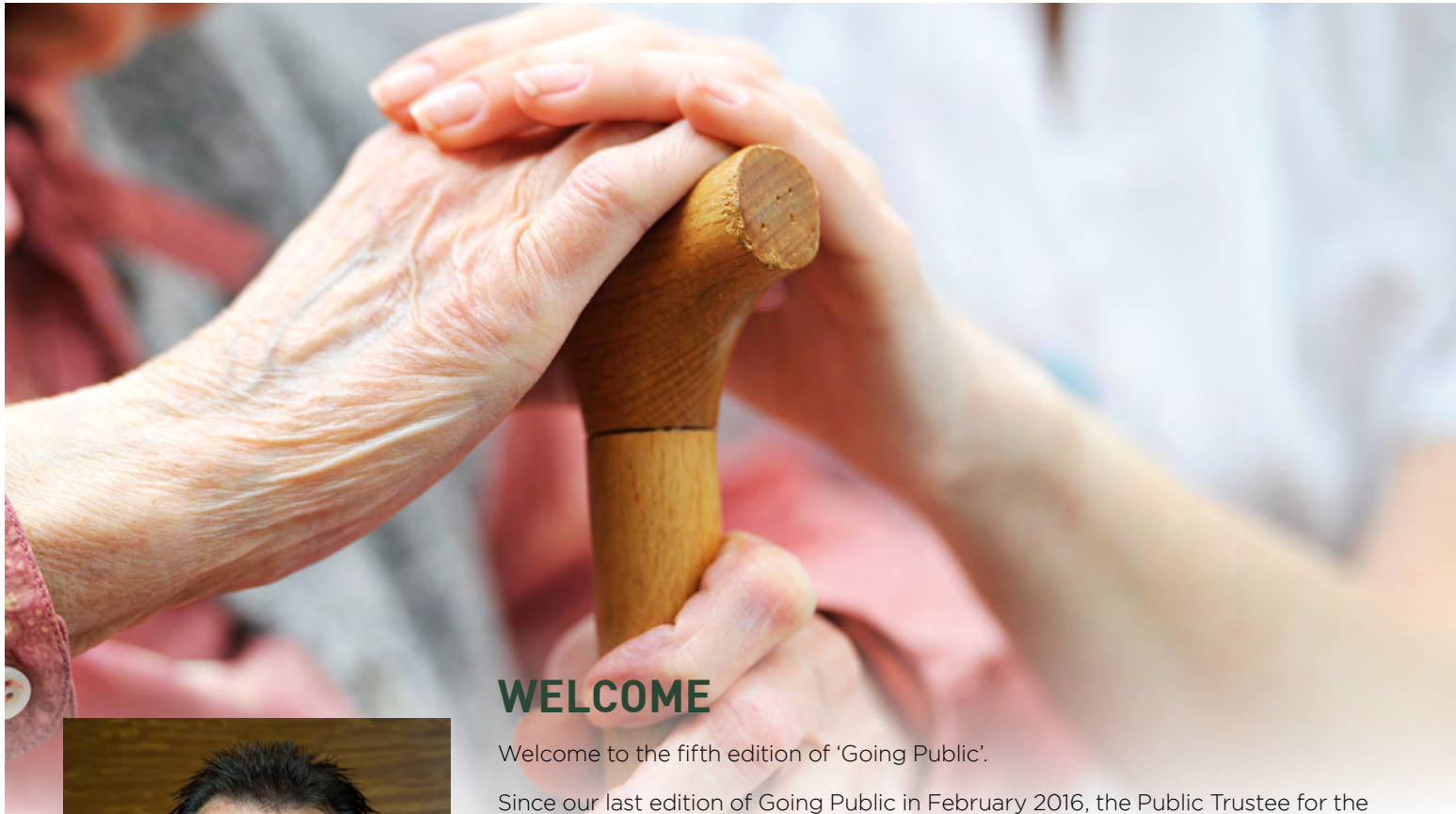




PUBLIC TRUSTEE
AND GUARDIAN

GOING PUBLIC

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WELCOME

Welcome to the fifth edition of 'Going Public'.

Since our last edition of Going Public in February 2016, the Public Trustee for the ACT amalgamated with the Guardianship function of the former Public Advocate of the ACT to become a new agency called Public Trustee and Guardian for the ACT (PTG). This issue explains the rationale behind this amalgamation and focuses on Guardianship, defining the concept of decision making ability and the options available when a person's decision making ability becomes impaired.

We look at safeguards in substitute decision making, bust a few myths and provide answers to frequently asked questions. Additionally, this publication highlights some interesting matters, showcasing lessons learnt as we strive to protect vulnerable people.

We trust you find this edition of Going Public interesting and informative.



Andrew Taylor

PUBLIC TRUSTEE
AND GUARDIAN

"This issue focuses on **GUARDIANSHIP**, defining the concept of decision making ability and the options available when a person's decision making ability becomes impaired."

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WE HAVE CHANGED!

In November 2015, the ACT Government announced a re-structure of ACT's rights protection agencies. As a result, on 1 April 2016, the Public Trustee for the ACT (PTACT) and the Public Advocate of the ACT (PAACT) were abolished as independent statutory offices by the implementation of the *Protection of Rights (Services) Legislation Amendment Bill 2016*.

The Bill had the effect of splitting the responsibilities of the former PAACT (Guardianship and Advocacy) between two separate agencies ie the Guardianship function moved to a new agency, the Public Trustee and Guardian (PTG) and the Advocacy function moved to an expanded ACT Human Rights Commission, along with ACT Victim Support.

The establishment of PTG is an opportunity to deliver upon the Attorney-General's vision for *"joined up management services for vulnerable Canberrans and a more holistic perspective to inform decisions about how best to protect a vulnerable person's wishes and their best interests."*

All services formerly provided by PTACT will remain the same with the new agency, however PTG will provide a more conjoined service delivery in respect to guardianship and financial management services for protected persons. The Guardianship Unit is committed to building strong relationships with stakeholders and increasing public awareness of the role of guardianship and the need for all people to have an up-to-date Enduring Power of Attorney.



What we do

The Public Trustee and Guardian (PTG) has the following Guardianship responsibilities -

- Visit persons for whom we are appointed a Guardian, to obtain their views and wishes and consult with them in relation to our decision-making and consent roles
- Consult with stake-holders including carers and family members
- Engage with government and non-government service providers to ensure that our clients, as protected persons, access the services and supports they are entitled to
- Advocate for the rights of protected persons.

Decision-making **ability**

In life, people are faced with decisions on a constant basis – what to wear, what to eat, how to relax. Sometimes these decisions are easy and sometimes they take more thinking – is there ever a good time to wear orange and pink together?

Decisions that have long term or far-reaching ramifications, such as consenting to medical treatment, creating a will, signing a lease or mortgage are underpinned by certain legal expectations. One of these is that people must have decision making capacity at the time of making the decision for it to be legally valid.

For individuals over 18 years of age, there is a presumption that a person has the ability (capacity) to make their own decisions. This is similar to the presumption of innocence and a person is considered to have decision making ability unless it can be proven otherwise. There is no requirement for a person to prove that they have decision-making ability. A person has the right to make their own decisions, even if those decisions are considered by the general population as immoral (e.g. deciding to engage in criminal behaviour) or unpalatable (e.g. choosing to live in squalor).

A person is considered to have capacity to make their own decisions if they can do all of the following -

- Understand when a decision needs to be made
- Understand the information relating to the decision
- Understand the main choices available
- Weigh up the consequences of the main choices
- Understand how the consequences could/will affect them
- Retain the information long enough to be able to make a decision
- Communicate the decision

A person has the right to make their own decisions, even if those decisions are considered by the general population as immoral or unpalatable



IMPAIRED DECISION MAKING ABILITY

Determining that a person does not have capacity to make their own decisions requires professional assessment and proof – usually in the form of a considered medical opinion. The common law test of a person's capacity is the ability to voluntarily give informed consent.

Informed consent – is the provision of formal agreement to a specific medical intervention and is given freely by a competent person who has understood complex and detailed information provided by a medical professional, including information about risks and who has weighed for themselves the consequences of having and not having the intervention. An example of this test of capacity can be found in a summation by a Court in the matter of Butler-Sloss LJ in *Re: MB [1997] 2 FCR 514 at 553 –554* as follows:

'in deciding whether a person has the capacity to make a particular decision the ultimate question is whether that person suffers from some impairment or disturbance of mental functioning so as to render him or her incapable of making the decision. That will occur if the person:

1. *Is unable to comprehend and retain information which is material to the decision, in particular as to the consequences of the decision; or*
2. *Is unable to **use** and **weigh** the information as part of the process of making the decision.'* [emphasis added].



What are the Safeguards?

ACT guardianship law presumes that a person is competent. This means that unless the contrary is proven, a person will be regarded as able to make their own decisions and manage their own finances.

There are clear limits placed on what constitutes impaired decision-making ability. This is designed to protect the natural diversity of our community by ensuring that grounds for appointment of guardians and managers are based on identifiable conditions rather than personal lifestyle choices.

A person should not be taken to have impaired decision-making ability, just because the person is eccentric, does or does not express a particular political or religious opinion, is of a particular sexual orientation or expresses a particular sexual preference, engages in illegal or immoral conduct or takes drugs or alcohol (but the effects of a drug may be taken into account).

Options for a person with impaired decision-making ability

Supported decision making is a model for assisting people to make their own decisions and exercise their legal capacity. It is increasingly being provided, particularly with people with disabilities and in relation to the NDIS. Supported decision making assists people to preserve their autonomy and right to make their own decisions for as long as possible. Supporting people to make their own decisions ensures that substituted decision making is considered after all other alternatives have been explored. Whilst Supported Decision-Making is presently under trial in the ACT, it is not presently established by law in the ACT.

Substitute decision making occurs when a person is unable to make their own decision and consequently, someone is legally appointed to make decisions on their behalf. The person's own views and wishes are paramount, but the appointment by a judicial body of a substitute decision maker means the person becomes subject to a formally appointed decision-maker.

Substitute decision making

There are three levels of substitute decision making in the ACT -

1. Enduring Power of Attorney – voluntary appointment (during capacity)

2. Health Attorney – appointed by health professionals

3. Guardianship and Financial Management – appointed by the ACT Civil and Administrative Tribunal (upon loss of capacity).

An EPA is often called a living will, although the term has no legal meaning in the ACT or Australia.

Enduring Power of Attorney (EPA)

An EPA is often called a living will, although the term has no legal meaning in the ACT or Australia. It provides a means by which a person with capacity can appoint another person/s to be a substitute decision maker for personal and medical issues and/or manage their property (including financial), both during their capacity and in the event of their loss of capacity. An individual must have capacity in order to make an EPA. Under an EPA, only financial decisions can be made by the attorney for the person while the person still has capacity, whereas non-financial decision-making can only commence when a person has lost the capacity to make decisions on their own behalf.

Health Attorney


A Health Attorney is a person authorised to give substitute consent to medical and dental treatment for people with impaired decision making ability (referred to as the protected person). A Health Attorney is appointed by the senior treating doctor or dentist at the time the substitute medical consent is required. The appointment of a Health Attorney only covers a single medical decision, meaning the appointment is not ongoing or long term.

Each of the following people can be a health attorney for a protected person-

- The protected person's domestic partner
- A carer for the protected person
- A close relative or close friend of the protected person.

Guardianship is a way of legally appointing a responsible person who can make personal decisions in relation to work, living arrangements and medical treatment and institute or maintain legal proceedings on behalf of a person who has been assessed as having an impaired decision-making ability.

Management – is a way of legally appointing a responsible person who can make financial or property related decisions and act on behalf of a person who is not legally competent and not able to make reasoned decisions for themselves about such transactions.



PTG
will seek
appointment as
emergency guardian
as a last resort and
often recommends
alternative courses
of action...

What is **emergency guardianship**?

Emergency Guardianship

Section 67 (1)(a) and (b) of the *Guardianship and Management of Property Act 1991* enables the appointment of PTG as Emergency Guardian and/or Emergency Manager by the ACT Civil and Administrative Tribunal (ACAT).

An emergency appointment is made when an urgent decision is required on behalf of an individual with impaired decision-making capacity and where there is no legally appointed substitute decision-maker eg under EPA, a private guardian, or a Health Attorney (for medical decisions).

In the ACT, only the PTG can be appointed on an emergency basis, meaning that, once an appointment is made, family and friends 'next of kin' cannot make decisions on behalf of someone else in an emergency situation (except in relation to health, in which case they can through appointment as a Health Attorney). This is another reason why it is important to have an EPA.

PTG will seek appointment as emergency guardian as a last resort and often recommends alternative courses of action to address a situation without the need for an emergency order.

Meet our newest Deputy PTG



Following the implementation of the *Protection of Rights (Services) Legislation Amendment Bill 2016* and the establishment of PTG, the Guardianship Unit now has a full complement of staff with the recent appointment of **Christina Thompson** as Deputy Public Trustee & Guardian/Manager - Guardianship.

Christina worked with the Public Advocate of the ACT for over nine years, during which time she established the role of Senior Advocate, Mental Health and Forensic. As a senior psychologist with extensive clinical and forensic experience, Christina joined PTG following an eight month secondment to Mental Health, Justice Health and Alcohol and Drug Services where she undertook a major service reform project.

The Guardianship Unit is a highly motivated and dedicated team with a broad range of professional qualifications and experience in psychology, law, human rights, disability, social work/social science, succession law, mental health and corrections.

GOING PUBLIC



MYTH - *I don't need formal orders, I am the parent!*

BUSTED! - There is no automatic authority for a parent, wife/husband, partner, adult child or any other person to make decisions for another person who has attained 18 years of age and over. Substitute decisions, including gaining or giving access to information, can only be made when there is a legal instrument in place giving authority to a person/s, such as a guardianship order EPA or Advanced Consent Directive.

MYTH - **Guardians have the power to make any decision they wish in relation to those for whom they act as guardian.**

BUSTED! - Guardians can only make decisions or provide consent consistent with their powers set out in the guardianship order. For example if the order does not specify the power to make decisions in relation to employment, a guardian cannot legally make employment decisions for the protected person.

MYTH - **Guardians do everything for the person as if they were the person themselves.**

BUSTED! - Guardians do not have the legal authority to determine the day to day choices of the protected person e.g. coffee or tea, red shoes or black shoes, bed time etc.

MYTH - **Guardians are case-managers.**

BUSTED! - Guardians do not manage the person, they are substitute decision makers who make a decision upon the information presented to them. Family members, support services and agencies involved with the person will retain the case management role.

MYTH - **Guardians can force people do something (e.g. allow people to access home to clean) or engage in things (e.g. treatment) even if the person does not wish to do that thing or engage in that thing.**

BUSTED! - A guardian can provide legal consent but cannot coerce, compel or restrain a person and they also cannot consent for this to occur or request someone else to do this. Altogether, this means a guardian cannot "make" someone do something.

Changes to **ACT** legislation

On 1 March 2016 ACT enacted new mental health legislation to increase the opportunity for people with mental illness and their family/carers to be involved in decisions about their treatment, care and support.

The *Mental Health Act 2015* includes the following new provisions, increasing the ability for people to retain control over their treatment and care through -

- Enshrining Advanced Consent Directions and Advanced Agreements in legislation which provides a way for people to identify how they want to be treated (or not) in the event that they become unwell.
- Enabling an individual to nominate in writing, a person who they authorise to make decisions or provide consent on their behalf should they be unable to do so due to their mental illness.
- Increased importance on the tribunal ascertaining a person's capacity to make their own decisions and greater thresholds for creating a mental health order.
- Empowering a guardian to provide substitute-consent to treatment for mental illness. This means that a person who is already under guardianship, or who is willing and compliant but does not have the capacity to provide informed consent, can be supported by a guardian, rather than having a mental health order imposed.

This last point has ramifications for the work of PTG's Guardians as this is not an area where guardians have previously had authority. PTG must now consult with clients about their mental health treatment and the relevant mental health treating team. In order to provide substitute consent for psychiatric treatment, as is currently the case for other medical treatment, guardians will require -

- Timely information about the type of treatment being recommended
- An assessment of the risks and benefits of such treatment; possible side-effects; and options for alternative treatments (including non-pharmaceutical options).

A close and collaborative working relationship between guardians and mental health services in the ACT will be required in order to support and enhance the treatment and care of individuals with a mental illness and/or a mental disorder.

PTG must now consult with clients about their mental health treatment and the relevant mental health treating team.





Case Study 1

Gwen, a 68 year old woman with dementia appointed a family member to be her substitute decision-maker under an EPA. When Gwen behaved in such a way that criminal proceedings were initiated, the appointed attorney did not feel capable of handling the complexity of the legal matter. PTG was appointed as emergency guardian by ACAT for legal and accommodation matters and the EPA was revoked. PTG was involved in liaising with the police and instructing Gwen's legal representation as well as providing consent for appropriate accommodation to support Gwen in consultation with the previously appointed attorney.

Lesson learnt – Carefully select and discuss your views and wishes with the person or persons you nominate to act as your attorney, so that even if they are unable to continue as your attorney, they can provide your views and wishes to an appointed guardian.

Case-studies – Lessons learnt

Case Study 2

Bruce is a 45 year old man who was involved in a serious motor vehicle accident resulting in PTG being appointed as emergency guardian. Bruce sustained life-threatening injuries and was sole parent for his two teenage daughters. Care and Protection Services commenced proceedings in relation to the care and welfare of his children as he was unable to care for them while in hospital. PTG represented Bruce at these proceedings and successfully advocated for his wishes in respect to his daughters' care to be accepted by the Court. Fortunately, Bruce eventually recovered capacity to act on his own behalf.

Lesson learnt – This highlights that unexpected things can happen to anyone at any stage of their life. Creating an EPA or, at the very least, ensuring that people close to you clearly understand your wishes, such as who you would like to care for your children if something untoward should occur, protects both yourself and those you are responsible for – including your beloved pets.

Case Study 3

PTG's Guardianship Unit assisted an elderly person residing in a residential aged care facility (RACF). During a visit, PTG noticed that he had lost a significant amount of weight and complained about the food he was being provided. With reduced swallowing reflex and limited ability to chew, he was only being served pureed foods.

In response to his concerns, PTG requested an urgent case conference with the RACF management and advocated for additional care and support; specialist medical treatment; a full review of his diet through a dietician and review by a speech pathologist regarding his swallowing reflex as well as one on one mealtime support. As he had no immediate family, PTG sought weekly social support through the Red Cross Volunteer Program.

PTG actively monitored the progress of these referrals and increased care requests. As a result, our client accessed appropriate medical care, was provided with more appealing alternative meal options and he began to gain weight. He is also now enjoying weekly social visits from his Red Cross volunteer.

Lesson learnt – PTG's Guardians recognise that the life can be lonely and difficult for elderly people without family visits and support. PTG's Guardians are committed to advocating for the rights and well-being of its clients and will continue to oversee and review their care. PTG feels privileged to undertake this work and will continue to strive to ensure our clients' lives are spent with dignity and respect.



Frequently asked questions.

Q: Who can be a guardian?

A: ACAT must prefer the appointment of an appropriate individual, who is willing to act as guardian. The individual does not have to be a family member, close friend or spouse. PTG will only be appointed where this is not an appropriate person to appoint or there are no appropriate people willing to take on the role.



Q: Can I choose my guardian?

A: You can make your views and wishes known to ACAT, which by law, must take your preferences into account. In the end though the decision is made by ACAT.

Q: Is a parent automatically a guardian?

A: Not if a person has attained 18 years of age or over. No-one, including a parent, can make decisions on behalf of another person 18 years or over without being legally appointed. If you believe that a person over 18 needs a person to make decisions for them and that person does not have an EPA, you must apply for a guardianship order through ACAT.

Q: Does a guardian have the same powers as a parent?

A: No, a guardian is constrained by the requirements in the legislation. In the ACT, guardians must act according to s.4 of the *Guardianship and Management of Property Act 1991* (the Act) in relation to decision making and are restricted in relation to specific decisions eg they cannot consent to “prescribed medical procedures” which are particular medical procedures stipulated in the Act and include any procedure relating to contraception, sterilisation, electroconvulsive therapy or psychiatric surgery.

Q: What decisions can a guardian make?



A: This depends on the powers granted to the guardian by ACAT but can include decisions in relation to: accommodation, legal, educational, employment, medical procedures or other treatments (other than a prescribed medical procedure) and decisions that protect a person's health and welfare from unreasonable risk.

Q: What does it mean for guardians to act jointly or severally



A: If two or more guardians are appointed they can be appointed to act either jointly or severally (separately). If appointed jointly then every decision must be signed off by all guardians. If severally, each guardian can decide without the consent of the other.

Q: What if my sibling/family member is a guardian for my parent and I don't agree with the decisions they are making?

A: You can apply to ACAT for the matter to be reviewed and to consider the decisions that are being made and your reasons for disagreeing. ACAT will rule on the appropriateness of the decisions being made and whether the decisions should be made or should not be made. You can also apply to ACAT to be included as one of the guardians or to have someone removed as guardian.

If two or more guardians are appointed they can be appointed to act either jointly or severally (separately). If appointed jointly then every decision must be signed off by all guardians. If severally, each guardian can decide without the consent of the other.



Common pitfalls

The most common pitfall that PTG observes in relation to EPA or guardianship matters is that people are reluctant to discuss their wishes and requests, in relation to end of capacity or end of life matters, with family members.

People avoid these conversations for fear of causing upset or of facing the reality of our own mortality. In reality, these conversations make the role of the family/friend/loved one significantly easier and can alleviate any feelings of guilt, anger, pressure or inadequacy at a time that is often quite emotional. Outlining your views and wishes and making these known enables these decisions to be made confidently and in the knowledge that it would be what you would have chosen for yourself.

Other common mistakes that people make in relation to an EPA include:

- Thinking about what should happen to your dependents and your property when you pass away (normally covered under a Will), but not thinking enough about what should happen if you are alive but unable to make decisions.
- People often fail to specify their views and wishes adequately and instead focus primarily on identifying who should make decisions ie they focus on choosing the people to make decisions, rather than what they want the decisions to be.
- Not letting people know that you have made an EPA and where the original is, as some agencies only accept the original.
- Not ensuring that you obtain or keep evidence (e.g. a doctor's report) regarding a person's capacity to make an EPA where it could reasonably be challenged later. For example, making an EPA during the early stages of dementia.

Common mistakes people make in relation to guardianship include:

- Failing to consult with the person in whatever means of communication the person can. Even with a decision making impairment, the person's views and wishes must be obtained at every opportunity.
- Making the assumption that you must have all the answers. It is ok, and indeed preferable, to consult with others in order to make a decision, including the person, their family, friends, and carers as well as service providers.
- Parents who become guardian can often struggle to appreciate the development and growing autonomy their adult child can enjoy, despite an impairment in decision making ability.
- Not understanding the difference between making decisions jointly or severally, or not understanding that several people can be named as guardian for the one person (eg. all siblings being listed as guardian for a parent). This often causes a lot of family friction.

OUR CUSTOMERS SAID...

Following the establishment of PTG, clients, families and stakeholders responded positively. Here are some examples of feedback our Guardians have recently received:

"Just a quick note to say thank you for your support of [our joint client] over the last month."

"There have been a few challenges over this time and I really appreciated your advice and clear direction during this time."

"Thank you so much for your support while I have been working with [joint client]"

"Thank you for persevering, I reckon we have a lot to thank you for."

"I tell everyone if they need a guardian to get you."

"Thank you for your time on Friday. I have received some positive feedback about the information you presented."

"Thank you for bringing our aunty back to country."

FACT SHEETS



Our Fact Sheets can be found under "Publications" on our website at www.publictrustee.act.gov.au

You'll find comprehensive information about a range of issues and services.

Our top four Fact Sheets have been translated into five different languages.

CONTACTING US

HOURS	- 9:00am - 4:30pm (Mon - Fri)
OFFICE	- 221 London Cct, Canberra City ACT
POST	- PO Box 221, Civic Square ACT 2608
PHONE	- (02) 6207 9800
FAX	- (02) 6207 9811
EMAIL	- publictrustee@act.gov.au
WEB	- www.ptg.act.gov.au

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