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Refusal of Treatment Certificates

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In 1988 the Victorian Parliament passed the Medical Treatment Act (“the Act”) to clarify the law relating to the rights of patients to refuse medical treatment. This followed a Parliamentary inquiry into the possible options available for dying with dignity.

The Act introduced a procedure to enable patients to clearly indicate their decision to refuse medical treatment, known as a Refusal of Treatment Certificate or “RTC”.

An RTC enables a patient to refuse medical treatment subject to a number of stringent requirements. The Act provides the form the certificate must take.

Requirements

For an RTC to be valid, two people, including a medical practitioner, must attest to the following:-

1. the patient is 18 years of age or older and of sound mind;
2. the patient’s decision is being made voluntarily and without inducement or compulsion
3. the patient is properly informed regarding the medical condition and treatment options available for the particular condition; and
4. the patient has clearly expressed his or her decision to refuse particular or general medical treatment.

One of the essential features of an RTC is that it can only be made with respect to a current medical condition, that is known to the person making the certificate. This condition must be specified in the certificate. In this sense, it differs from common law health care directives that tend to be expressed in general terms and in anticipation of the onset of a future medical condition.

The Act further allows for an appointed Medical Agent or Guardian to complete an RTC and refuse treatment on the patient’s behalf, where:

1. the medical treatment would cause unreasonable distress to the patient; or
2. there are reasonable grounds for believing that the patient, if competent, and after giving serious consideration to his or her health and well-being, would consider that the medical treatment is unwarranted.

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Scope

The RTC is limited to medical treatment, specifically:

1. an operation;
2. the administration of a drug or other like substance; or
3. any other medical procedure.

An RTC can not be made to refuse palliative care, such as pain relief or the reasonable provision of food and water. Inevitably, difficulties will arise over what constitutes palliative care or medical treatment particularly when forms of medical treatment are used as palliative measures. An example may be radiotherapy.

A further issue may arise if not all current medical conditions are included in the RTC or if a new condition is contracted after the RTC has been signed. For example, if a person with terminal cancer has only specified cancer on the RTC and he or she later contracts pneumonia then the RTC could not prevent antibiotics being administered to combat the pneumonia.

Enforceability

A medical practitioner can be charged with medical trespass if he or she contravenes an RTC by providing treatment prohibited by an RTA. This provides enforceability of the certificate.

Common Law Rights

RTC's do not affect the right to refuse treatment pursuant to long standing common law rights, however it is worth noting that the extent and enforceability of common law rights to refuse treatment have not been determined by the Courts. Given this, an RTC is the most effective method of having your refusal of medical intentions enforced.

Requests to Charities - The Tax Consequences

Philanthropic and charitable giving via a Will is a common objective for many. In making a charitable bequest, the tax consequences of such a gift should be considered as part of the estate planning process.

The income tax legislation has two tax concepts relating to charities:

1. tax exemption; and
2. tax deductibility.

Some organisations are tax exempt and therefore the organisation pays no income tax on its activities. Some organisations are deductible gift recipients ("DGRs") and therefore gifts made to them are deductible for the donor. A number of charitable organisations qualify

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both as tax exempt and as DGRs. Other organisations are tax exempt only, but are not DGRs, for example churches and many other religious organisations.

The nature of the gift and the taxation status of an organisation will affect the taxation consequences of a bequest.

Gifts to a Tax Exempt Organisation

When an asset passes to a tax exempt organisation by virtue of death, the income tax legislation deems that the deceased made the gift immediately prior to death for market value. This is referred to as CGT Event K3. The estate becomes liable for capital gains tax ("CGT"). This will not be relevant if the asset was acquired prior to the introduction of CGT on 20 September 1985 or if the asset is cash, which is not subject to CGT.

Therefore, if you intend to make a gift to an organisation that is tax exempt, it is usually preferable to make the gift in the form of cash, if you have cash reserves available. If you gift other assets such as shares or real estate which are subject to CGT, then this may reduce the value of the gift or the value of gifts made to other beneficiaries.

The Cultural Bequests Program

There is a notable exception to this rule. If you make a gift in your Will under the *Cultural Bequests Program*, the gift is exempt from CGT. The *Cultural Bequests Program* is administered by the Federal Department of Communications, Information Technology and the Arts. Essentially the program encourages gifts of significant cultural items to public art galleries, museums and libraries by giving donors an income tax deduction for the market value of their gifts.

The gift can take any form other than an interest in land or a building. In addition, the property must be accepted by the institution receiving it, for inclusion in a collection that it is maintaining or establishing. It is recommended that if you wish to make a non cash, charitable gift in your Will, you should first make contact with the intended recipient to discuss the nature of the gift (and their interest in it), and then seek advice about the likely tax consequences.

Gifts to Tax Deductible Organisations

The tax consequences of a gift to an organisation that is also a DGR differ considerably to gifts made to a tax exempt organisation. The Tax Act allows for a capital gain arising from a testamentary gift to be disregarded, provided the gift would have been deductible had it not been a testamentary gift. Therefore, if the organisation to whom you wish to make a specific gift of an asset is a DGR, provided the requirements of the Tax Act are satisfied, the estate will not be liable for the payment of capital gains tax liability arising from the making of the gift.

In contemplating a charitable gift of an asset other than cash, you may wish to determine whether the organisation has a tax deductible fund to which the gift could be directed.

Moores@Mornington

Moores Legal now has a presence on the Mornington Peninsula.

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Since February 2008, we have had a lawyer present on the Peninsula to assist clients with estate planning and elder law requirements.

Moore's Legal already had a number of clients and referrers located on the Peninsula. The opening of our Mornington office enables us to better service our existing contacts and commence serving new clients and referrers.

Therefore, for advice in relation to Wills, Powers of Attorney, Estate Planning, Estate Administration, Wills Disputes, Guardianship and Administration and other elder law and estate planning advice please contact Andrew Simpson on 9843 2163 or Rohani Bixler on 5977 1263.

Andrew and Rohani are also available to speak at social or community club events on any of the above topics.

For an appointment at our Mornington office please telephone 5977 1263 or 9898 0000.

The Moore's Legal Elder Law Team

We have a range of practitioners who are able to assist with any minor queries or major issues you may have. If you require further information, please contact a member of our Team

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DISCLAIMER: *This Elder Law Briefing is of a general nature only. Specific legal advice should be sought rather than relying on this newsletter.*

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