

## Countdown to the Mental Capacity Act 9 – Lasting Powers of Attorney

From 1 October 2007 the Mental Capacity Act 2005 (“the Act”) will bring into force a new form of Attorney, a Lasting Power of Attorney (LPA).

### Enduring Powers of Attorneys

An Enduring Power of Attorney cannot be created after 30<sup>th</sup> September 2007, however, Enduring Powers of Attorney created before that date, can be registered and used after 1<sup>st</sup> October 2007. Enduring Powers of Attorney that are already registered will not cease to be effective. Therefore, after 1<sup>st</sup> October 2007 there will be both Enduring Powers of Attorney and Lasting Powers of Attorney.

### Why is an LPA Different?

The fundamental difference between an EPA and a LPA is that not only can attorneys under LPAs, if so directed, make decisions covering property and financial affairs, but they can also make decisions, if so directed, about an individual’s personal welfare which includes healthcare. Accordingly, a donor can choose one person to be their attorney to make decisions about both financial and property matters as well as welfare matters. Alternatively, that individual may wish to appoint a number of different attorneys to make different kinds of decision. For example one relative or friend may be appointed to manage the individuals finances and another

relative may be appointed to manage any welfare decisions that need to be made.

The Act therefore makes a healthcare proxy valid for the first time in English law. This may bring a very new dynamic to healthcare decisions in such cases.

### Registration of LPAs

The Regulations under the Act have provided that a specific form be used when a Lasting Power of Attorney is created. A Lasting Power of Attorney must be registered with the Public Guardian before it is used and it cannot be used and does not give the Attorney any legal power to make decisions on the donors behalf before it is registered.

If the LPA provides that the Attorney can make decisions about property and affairs, then as long as it is registered it can be relied upon even while the Donor still has capacity, but only so long as the Donor does not say otherwise in the Lasting Power of Attorney documentation. However, where the LPA is given powers to make decisions about welfare matters, including healthcare decisions, the Attorney can only make such decisions once the LPA is registered and the Donor loses capacity to make the welfare decisions in question.

Only individuals aged 18 or over have the power to make LPAs and they must have the required capacity to do so. For an LPA to be valid:

- The LPA must be a written document set out in the statutory form prescribed by Regulations.
- It must include prescribed information about the nature and effect of the LPA (as set out in the Regulations).
- The donor must sign a statement saying that they have read the prescribed information (or somebody has read it to them) and that they want the LPA to apply when they no longer have capacity.
- The document must name people (not any of the attorneys) who should be told about an application to register the LPA, or it should say that there is no-one they wish to be told.
- The Attorney must sign a statement saying that he has read the prescribed information and understands the duties, in particular the duty to act in the donor's best interests.
- The LPA document must include a certificate completed by an independent third party, confirming that:
  - in their opinion, the donor understands the LPA's purpose.
  - nobody used fraud or undue pressure to trick or force the donor into making the LPA and
  - there is nothing to stop the LPA being created.<sup>1</sup>

## The powers of a Lasting Power of Attorney

A personal welfare LPA gives the attorney the power to make decisions about accepting or refusing medical treatment unless the donor has specifically said otherwise within the documentation. However, even where a general welfare LPA has been created and no restrictions have been imposed, an attorney does not have the right to consent or refuse to the following treatment :

- The attorney has no decision making power if the donor can make their own treatment decisions.
- An attorney cannot consent to treatment if the donor has made a valid and applicable advance decision to refuse a specific treatment. But if the donor made an LPA after the advance decision, and gave the attorney the right to consent to or refuse the treatment, the attorney can choose not to follow the advance decision.

- An attorney has no power to consent to or refuse life sustaining treatment unless the LPA document expressly authorises this.
- An Attorney cannot consent to or refuse treatment for a mental disorder where a patient is detained under the Mental Health Act 1983.<sup>2</sup>

The Code of Practice to the Act confirms<sup>3</sup> that an LPA does not give the attorney the power to demand specific treatment that healthcare staff and clinicians believe is not necessary or appropriate for the individual's particular condition.

Where an attorney is acting under a personal welfare LPA and they are making decisions in relation to healthcare matters, they must act in the donor's best interests. The best interest obligations under the Act require a list of individuals to be consulted over any proposed treatment. The list includes attorneys and therefore healthcare staff should consult an attorney when best interest decisions are being taken. If anyone doubts that an attorney is acting in an individual's best interests, then an application can be made to the Court of Protection.

## Areas of potential difficulty

- (a) The extent of the attorney's powers.

The powers granted to an attorney will depend entirely on the wording of the LPA documentation. If a personal welfare attorney has been registered, that attorney will have no authority to make decisions about the patient's finances or property. Conversely, if a property and affairs attorney has been created, they will have no power to make any decisions about healthcare matters for the patient. It is, therefore, important that staff carefully check the wording of the attorney documentation. The donor may also have provided specific restrictions on the attorney's powers.

- (b) Potential conflict of interest.

There may be a conflict of interest where a donor appoints an attorney to make decisions about both their financial affairs as well as decisions about their personal welfare. Attorneys may be placed in a situation where they need to make a welfare decision about the donor's care and treatment which will incur cost. If that attorney is a beneficiary under the donor's will there is the risk of conflicting interests. If there is concern that an attorney is potentially not acting in the best interests of the patient,

<sup>1</sup> Mental Capacity Act 2005 Code of Practice, p117, para. 7.7

<sup>2</sup> Ibid pp122-123, para. 7.27

<sup>3</sup> Ibid p 123 Para. 7.28

then an application can be made to the Court of Protection for the Court to make a decision about best interests.

(c) Conflict with the care team.

Another area of potential difficulty is where a welfare

attorney decides to make a healthcare decision which is contrary to the advice of the care team. If there is any concern about whether this is in the patient's best interest, then an application to the Court of Protection may be made.

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