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FACTSHEET

Enduring Power of Attorneys and Welfare Guardians

An enduring power of attorney (EPA) gives a person the power to make decisions on another person's behalf, in particular circumstances. A welfare guardian appointed by the Court is also given similar powers. This factsheet discusses EPAs and welfare guardians.

EPA for Personal Care and Welfare

There are two types of EPAs: EPA for Property, and EPA for Personal Care and Welfare. It is the latter which is relevant to doctors when providing medical care. An EPA for Personal Care and Welfare comes into effect if the person who has made the EPA (the "donor") becomes "mentally incapable". It allows decisions about the donor's health and welfare to be made by the appointed person (the "attorney").

Mental incapacity

A person is considered mentally incapable if they lack the capacity:

- to make a decision about a matter relating to their personal care and welfare; or
- to understand the nature of those decisions; or
- to foresee the consequences of making those decisions (or of failing to make those decisions); or
- to communicate those decisions to others.

It must be remembered:

- a person is presumed to have capacity, unless proven otherwise;
- mental capacity must be assessed at the time the attorney proposes to make or makes a decision on a matter, and in relation to the matter concerned.

The requirement that capacity be assessed 'in relation to the matter concerned' refers to how different decisions require different levels of capacity. For example, a person may be deemed to have sufficient capacity to consent to taking antibiotics, but not to undergoing high-risk surgery.

What decisions can an attorney make?

An attorney can make decisions relating to the donor's personal care and welfare, subject to certain conditions and restrictions. Importantly, section 98 of the Protection of Personal and Property Rights Act 1988 (the Act) provides that an attorney must not act in respect of:

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A "significant matter" without a medical certificate or court order that the donor is mentally incapable. A "significant matter" is "a matter that has, or is likely to have, a significant effect on the health, well-being, or enjoyment of life of the donor";

Any other matter unless the attorney believes on reasonable grounds that the donor is mentally incapable.

In terms of section 98, it is important too for an attorney to be mindful that the donor's mental incapacity may be fluid. A certificate of mental incapacity given previously will not necessarily mean that the donor remains mentally incapable for the purposes of the Act. It is important therefore that the attorney turns their mind to the question of the donor's mental incapacity on each and every occasion the attorney is considering making a decision on the donor's behalf.

A good example is the donor who from time to time suffers from delirium, who may be mentally incapable one day but perfectly capable the next. This of course is significant for medical practitioners. For example, if a practitioner considers that a patient/donor is at any given time mentally capable, then it is for the donor to make decisions about his or her medical care, not the attorney.

Furthermore, section 18 prohibits an attorney from:

- refusing consent to the administration of any standard medical treatment or procedure intended to save the donor's life or to prevent serious damage to the donor's health; or
- consenting to electro-convulsive treatment; or
- consenting to surgery on the donor's brain designed to destroy any part of their brain or any brain function for the purpose of changing the donor's behaviour; or
- consenting to the donor taking part in any medical experiment, unless it is to save the donor's life or prevent serious damage to the donor's health; or
- requesting on behalf of the donor, the option of receiving assisted dying under the End of Life Choice Act 2019.

Specific conditions and restrictions may also be recorded by the donor in the EPA itself.

The Act also provides that attorneys must, as far as practicable, consult with anyone named in the EPA and with the donor (where possible), and always act in the donor's best interests.

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A donor may have an advance directive which sets out in advance the treatment that the donor wants, or does not want, should they become unwell in the future and lose the capacity to make decisions about their care. (Information about Advance Directives can be found in NZMII's **Advance Directives factsheet)**.

Attorneys may have regard to an Advance Directive, subject to consultation, except to the extent that it requires the attorney to act contrary to the provisions of section 18.

Medical certificate of capacity

As a health practitioner, you may be requested to provide a medical certificate assessing a patient's mental capacity. This may be to activate an EPA, or because an attorney is making a decision on a "significant matter". It also may be required to assist the court in making an order appointing a welfare guardian (covered below). You may only complete a certificate assessing capacity if it is within your scope of practice to do so.

There are a number of requirements for what a medical certificate must contain. These are set out under section 5 of the Protection of Personal and Property Rights (Enduring Powers of Attorney Forms and Prescribed Information) Regulations 2008.

The full list of requirements can be **found here**.

Welfare Guardians

Under section 12 of the Act the court may make an order appointing a welfare guardian to a person, provided that the person in respect of whom the order is made "wholly lacks the capacity to make or communicate decisions" relating to his or her personal care and welfare.

A welfare guardian has authority to make and implement decisions on that person's behalf in respect of their personal care and welfare. They are bound by the powers and duties of section 18 of the Act (see above), and must act in the best interests of the person and consult with them where possible.

What if a patient has both an EPA and a section 12 order?

Where a patient has both an EPA and a section 12 order, there are two points to be aware of:

- a section 12 order is sufficient evidence of a welfare guardian's authority to make decisions on that person's behalf, regardless of whether an EPA has been activated; and
- a section 12 order is binding on any attorney appointed under a person's EPA. Therefore if a patient has both an activated EPA as well as a current court order and a conflict arises between the two, the court order prevails.

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Encountering an EPA or welfare guardian when providing medical care

When dealing with an EPA or welfare guardian, you should:

- determine whether the EPA or court order is activated/in force; and
- confirm who the attorney or welfare guardian is.

For an EPA, you should expect to see a medical certificate on the patient's clinical records which activates it. For a court order, there will be an expiry date recorded on the order itself. (After this date the welfare guardian must cease to act).

The EPA or court order will also name the attorney or welfare guardian. You should be careful to properly identify the attorney or welfare guardian, for example by sighting that person's driver's licence or passport.

What should I do if a patient asks me to be their attorney?

What should you do if a patient asks you to accept appointment under an EPA? MCNZ has advised that in most instances, becoming a patient's attorney is unwise as the medical practitioner could be perceived to have exerted undue influence on the patient. It is recommended then that you err on the side of caution by not accepting such an appointment.

NZMII are here to help!

Contact Us

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