

# MAKING DECISIONS FOR PEOPLE WHO LACK CAPACITY

## Mental Capacity Act 2005

### HEALTH CARE DECISION-MAKING BY ATTORNEYS AND DEPUTIES

*This is one of a series of resource materials for clinical ethics committees providing explanation and discussion of the sections of the Mental Capacity Act which are particularly relevant to their work.*

#### New power of proxy decision making

The Act introduces several mechanisms to allow people to prepare for a time in the future when they no longer have capacity. One of these mechanisms is the advance decision. Another is to appoint an attorney who has the authority to make certain decisions on their behalf. Under common law it was not possible to appoint another person to make healthcare decisions. By enabling people to appoint attorneys to make healthcare decisions the Act therefore fills in a significant gap in the law. This document focuses mainly on attorneys but it also outlines the role of Deputies (appointed by the Court of Protection).

#### Attorneys

##### Personal welfare attorney

Appointed under the Act – by a legal document called a lasting power of attorney (LPA) – are given legal authority to make decisions on behalf of another.

Two types of LPA's can be created under the Act. One deals with 'property and affairs', including financial matters (no further information will be provided here on this type of LPA). The other type of LPA is called a **personal welfare** LPA. The personal welfare LPA authorises the attorney to make decisions about various aspects of a person's personal life when he no longer has the capacity to make the particular decision in question (see Box 1). Most importantly this type of LPA can authorise the attorney (called the donee) to make healthcare and medical treatment decisions on behalf of the person who appointed them (called the donor in the Act but hereafter referred to as the patient).

*Change: The personal welfare lasting power of attorney is a new form of power of attorney. It gives a person the right to decide who should make health related decisions on their behalf at a time in the future when they no longer have capacity to make the decision in question.*

## Box 1

### Personal welfare LPAs

A general personal welfare LPA might include decisions about

- where the patient should live and with whom
- day-to-day care
- who the patient can have contact with
- assessments for community care services
- involvement in social/leisure activities, education or training
- personal correspondence and papers

**NB. The standard form general personal LPA allows attorneys to make decisions about anything that relates to the patient's personal welfare. But patients can add restrictions or conditions.**

A personal welfare LPA covering **healthcare** might include decisions about:

- a) consenting to or refusing medical examination / treatment/assessments on the patient's behalf
- b) arrangements needed for the patient to be given medical, dental, or optical treatment
- c) nursing care
- d) complaints about the patient's care or treatment

**NB. An attorney can only consent to or refuse life- sustaining treatment on behalf of the patient if the LPA states that the attorney is to have this authority.**

## Creating a valid LPA

There are a number of stringent formalities (see e.g. ss.9 and 10) governing the creation of a valid LPA. They stipulate that both the person appointing the proxy (called the **donor**) and the **donee** (the attorney decision-maker) must be aged **18 or over**. In summary the following conditions must be complied with if the LPA is to be legally valid:

- the patient must have capacity when s/he makes the LPA
- the document must include prescribed information about the nature and effect of the LPA
- the patient 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 attorneys must sign a statement saying that they have read the prescribed information and that they understand their duties –in particular the duty to act in the donor's best interests
- the LPA must be registered with the Office of the Public Guardian
- the document must include a certificate completed by an independent third party confirming that:
  - a) in their opinion, the patient understands the LPA's purpose
  - b) nobody used fraud or undue pressure to trick or force the patient into making the LPA and
  - c) there is nothing to stop the LPA being created.

## C. Who can be an attorney?

An attorney is likely to be a friend, relative or a professional (who must be clearly named). The Code advises that a paid care worker (such as a care home manager) should not agree to act as an attorney unless there are special circumstances (such as they are the only close relative of the patient). Otherwise it recommends appointing someone who is trustworthy, competent and reliable with the skills necessary to carry out the necessary tasks (Code 7.8).

It is possible to appoint more than one attorney at a time and to specify whether they should act jointly, jointly and severally or jointly in respect of some matters and jointly and severally in respect of others (see Box 2).

### Box 2

### Attorneys

#### Joint attorneys:

- 1) Must always act together
- 2) Must all agree and sign any relevant documents.

#### Joint and several attorneys

- 1) Can act together
- 2) Can act independently if they wish
- 3) Any action taken by any attorney alone is as valid as if they were the only attorney.

#### **NB.**

1. The patient may appoint personal welfare attorneys to act jointly and severally but specify that they must, e.g. act jointly in relation to giving consent to surgery.
2. If a patient has appointed two or more attorneys does not specify how they should act, they must always act jointly (s.10(5))
3. A patient may chose to name replacement attorneys to take over duties in certain circumstances.

## Duties of attorneys making healthcare decisions

According to s. 9(4) and the Code (7.19) they must meet the requirements of the Act. Most importantly they must:

- 1) follow the 5 statutory principles
- 2) consider whether the patient has **capacity** to make the decision for themselves. If not, consider whether the patient is likely to regain capacity to make the decision in the future. If so, consider delaying the decision until the patient can make it.
- 3) make sure that they have a '**reasonable belief**' that the donor lacks capacity.
- 4) make decision in the patient's **best interests** (i.e. follow s.4 checklist )
- 5) respect any **conditions** or **restrictions** that the LPA document contains

6) have regard to the guidance in the [Code of Practice](#)

7) only use [restraint](#) if: a) the patient lacks capacity (or the attorney reasonably believes he lacks capacity), b) it is necessary to do the act in order to prevent harm to the patient, and c) the restraint is a proportionate response to the likelihood of the patient suffering harm, and the seriousness of that harm.

NB. For details of an attorney's other duties see Box 3.

### **Box 3**

### **Attorney's duties**

**Code 7.58-66** specifies that attorneys take on a role which carries a great deal of power. They are expected to use this carefully and responsibly. In particular they have a duty to:

- Carry out the patient's instructions
- not take advantage of their position
- not delegate decisions, unless authorised to do so
- act in good faith
- respect confidentiality
- not give up the role without telling the patient and the court of protection
- apply certain standards of care and skill (duty of care) when making decisions

## **Implications for healthcare professionals**

A valid personal welfare lasting power of attorney exists gives an attorney the legal right to make healthcare and treatment decisions. Nevertheless health professionals should ask the following questions:

### **1. Is the person (patient) 18 or over?**

Only adults aged 18 or over can make an LPA (and they can only make one if they have capacity to do so)

### **2. Is the attorney 18 or over?**

Only adults aged 18 or over can be attorneys under an LPA

### **3. Does the patient have capacity?**

If the person has capacity to make the decision in question then the person must be given all the support necessary to make that decision (see File 2). In other words if health professionals consider that the person has the capacity to make his own treatment decisions the attorney has no legal right to make the decision on his behalf.

### **4. Is the patient detained under the Mental Health Act 1983?**

An attorney cannot consent or refuse treatment for a mental disorder for a patient detained under the Mental Health Act 1983.

### **5. Is there an advance decision?**

An attorney cannot consent to treatment if the patient has made (**after** the LPA was signed) a valid and applicable advance decision covering the treatment in question. However, if the advance decision was made **before** the LPA giving the attorney the right to consent or refuse treatment, the attorney can choose not to follow the advance decision. In other words the advance decision is overtaken by the LPA.

### **6. Is treatment in question life-sustaining?**

An attorney has no power to consent to or refuse life-sustaining treatment (described in the LPA as treatment needed to keep a person alive) unless the LPA document expressly authorises this.

### **7. Is the attorney refusing life-sustaining treatment?**

An attorney given legal authority to consent to or refuse life-sustaining treatment under the terms of the LPA has the legal authority to refuse such treatment (the decision must, of course, be in the best interests of the person).

In addition s.4(5) applies, i.e. in making any decision about whether life-sustaining treatment is (or is not) in the person's best interests the attorney must not be motivated by a desire to bring about the patient's death for whatever reason, even if this from a sense of compassion (Code 5.31).

### **8. Is there concern that the attorney is failing to act in the patient's best interests?**

Attorneys must always follow the Act's principles and make decisions in the patient's best interests. Healthcare staff may, however, disagree with how an attorney is applying the Act (see File 7 for dispute resolution)

**NB While concerns or disputes are being resolved about the actions of an attorney healthcare staff can give life- sustaining treatment to prolong the patient's life or stop their condition from getting worse.**

## **Deputies**

### **Appointment of deputies**

Deputies are appointed by the Court of Protection to make personal welfare decisions on behalf of a person who lacks capacity. The Act makes it clear that where possible the court should make the decisions itself rather than appoint a deputy but that if one needs to be appointed, their appointment should be as limited in scope and for as short a time as possible(s.16(4)(a)).

Deputies for personal welfare decisions are likely to be required only in the most difficult cases, Box 4)

**Box 4****Deputies****Code 8.38 : examples of when a deputy might be appropriate to make personal welfare (including healthcare decisions):**

- someone needs to make series of linked welfare decisions over time – e.g. a family carer close to a person with profound and multiple learning disabilities might apply to be appointed as a deputy
- the most appropriate way to act in the person's best interests is to have a deputy, who will consult relevant people but have the final authority to make decisions
- there is a history of serious family disputes that could have a detrimental effect on the person's future care unless a deputy is appointed to make necessary decisions
- the person who lacks capacity is felt to be at risk of serious harm if left in the care of family members.

**NB** A deputy might also be appointed by the court to replace an personal welfare LPA (if the attorney is, e.g., not acting in patient's best interests).

Deputies must be at least **18** years old. They can be family members or any other person (but not paid care workers unless there are exceptional circumstances (e.g. if the care worker is the only close relative of the person who lacks capacity)). Deputies can be appointed to act jointly or jointly and severally.

**Duties of deputies making healthcare decisions**

Although deputies may be given the legal authority to make healthcare decisions the Act imposes several restrictions on their powers. They have no authority to make decisions or take action in the following situations:

- **Capacity:** If the deputy knows or has reasonable grounds for believing that the person has capacity to make the particular decision for themselves.
- **LPA:** If their decision goes against a decision made by an attorney acting under a personal welfare lasting power of attorney granted by the patient before they lost capacity.
- **Refusing life-sustaining treatment:** The Act prohibits deputies from refusing consent to the carrying or continuation of life-sustaining treatment in relation to the patient.

In all other situations when deputies are making healthcare decisions they must:

- 1) follow the Act's **5 statutory principles**
- 2) consider whether the patient has **capacity** or is likely to regain **capacity** to make the decision in the future. If so, it may be possible to delay the decision until the person can make it
- 3) make decisions in the patient's **best interests** (i.e. follow s.4 checklist)

- 4) have regard to guidance in the [Code of Practice](#)
- 5) only make decisions the court has given them the authority to make
- 6) only use [restraint](#) if: a) he is acting within the scope of an authority expressly conferred on him, b) the patient lacks capacity (or the deputy reasonably believes that he lacks capacity) in relation to the matter in question, c) restraint is necessary to prevent harm, and, d) the restraint is proportionate.

**NB.** For details of a deputy's other duties see Box 5

**Box 5**                      **Deputy's duties**

**Code 8.55-67** states that deputies must carry out their duties carefully and responsibly. In particular they have a duty to:

- act with due care and skill
- not take advantage of their situation
- not delegate duties
- act in good faith
- respect confidentiality
- comply with directions from the Court of Protection

## **Implications for healthcare professionals**

In the unlikely event that a deputy is empowered by the Court of Protection to make healthcare decisions on behalf of a person who lacks capacity health professionals should nevertheless address the following questions:

### **1. Does the patient have capacity?**

If the patient has capacity to make the decision in question (or the deputy has reasonable grounds for believing that the patient has capacity) then the deputy has no power to make the decision on the patient's behalf.

### **2. Is there concern that the deputy is not acting in the patient's best interests?**

Deputies must always follow the Act's principles and act in accordance with the Court of Protection's authority. If healthcare staff disagree with how a deputy is applying the Act or is not acting in the patient's best interests they should raise their concerns with an appropriate person.

### **3. How should concerns be dealt with?**

As the Code makes clear, the Office of the Public Guardian is responsible for supervising deputies. Anyone suspecting that a deputy is abusing their position should contact the OPG immediately.