

Enduring Power of Attorney

With an aging population and a greater emphasis on doctors working in partnership with consumers, an understanding of enduring powers of attorney (EPOA) is important. Typically doctors will encounter EPOAs in two situations. In the first scenario, the doctor is asked to provide a medical certificate about a patient's mental capacity in order to invoke or activate an EPOA. In the second scenario, a doctor will need to consider whether the patient has appointed an attorney and if so whether the EPOA has been activated as part of obtaining informed consent for treatment of an incompetent or potentially incompetent patient.

An EPOA is a legal document in which a person (the donor) appoints another person (the attorney) to make decisions on the donor's behalf if the donor becomes incompetent. Anyone over the age of 18 years can sign an EPOA as long as he or she is competent to do so at the time. If there is doubt about the donor's mental capacity, the donor may seek to obtain a doctor's certificate before signing the EPOA. The doctor needs to be satisfied that the donor understands what an EPOA is, and how much authority the donor is giving to the attorney.

There are two types of EPOA:

1. For personal care and welfare. Only one person can be appointed as a care and welfare attorney. A care and welfare EPOA can come into effect only if the person becomes incompetent.
2. For property. For this type of EPOA, two or more property attorneys can be appointed. Anyone over the age of 18 years can sign an EPOA if they are competent to make decisions for themselves. In contrast to care and welfare EPOAs, an EPOA for property can take effect while the person is still competent to make his or her own decisions. For example, a person may wish to activate a property EPOA while living overseas.

In the case of an EPOA for personal care and welfare, the attorney must not act in respect of a "significant matter" unless a "relevant health practitioner" has certified, or the court has determined, that the donor is mentally incapable. With regard to any other matter relating to the person's personal care and welfare, the attorney must not act unless he or she believes on reasonable grounds that the person is mentally incapable. A "relevant health practitioner" means a health practitioner whose scope of practice includes the assessment of a person's mental capacity. The donor may specify that the assessment of mental capacity is to be undertaken by a health practitioner with a specified scope of practice but only if that scope of practice includes the assessment of a person's mental capacity.

The medical certificate addressing competence does not have to be in a specified form, but it must contain the certifying practitioner's opinion that the person is incompetent in that he or she lacks one of the following:

- The capacity to make a decision about a matter relating to personal care and welfare;
- The capacity to understand the nature of such decisions;
- The capacity to foresee the consequences of decisions; or
- The capacity to communicate decisions.

The medical certificate must also contain the following information:

- The name, address, and registration number of the certifying practitioner
- The health profession in which the certifying practitioner is registered
- That the practitioner's scope of practice includes assessment of mental capacity
- The date of the examination or assessment

- The full name of the donor and the date of the EPOA
- The practitioner's signature and the date of the certificate

Although the attorney steps into the shoes of the donor with regard to decision-making once the EPOA is activated, there are some restrictions on the decisions that the attorney can make. Section 18 of the Protection of Personal and Property Rights Act 1988 (PPPR Act) sets out a number of decisions that an attorney cannot make, including refusing consent to the administration of any standard medical treatment or procedure intended to save the person's life or prevent serious damage to the person's health. Additionally, attorneys cannot consent to the person taking part in any medical experiment unless it is conducted for the purpose of saving the person's life or preventing serious damage to the person's health.

It is important to note that an EPOA has no effect until it has been invoked or activated, so the person appointed cannot make decisions for the donor just because he or she is the appointed attorney. HDC often sees cases where family members of patients strongly believe they have rights despite the patient retaining capacity to make his or her own decisions.

For a doctor treating an incompetent or potentially incompetent patient where an EPOA exists, it is important to consider the following questions:

- Has the EPOA been activated?
- Is the patient competent at the time of the assessment?

If the patient is incompetent, does the attorney consent to the treatment (bearing in mind the restrictions on an attorney's powers set out above)?

If the patient is incompetent and the EPOA has not been activated, then it will be necessary to complete a medical certificate so that the attorney can start acting on the patient's behalf. In some cases, a patient can recover and regain competence, even after an EPOA has been invoked. If this is the case, the doctor will need to document his or her opinion carefully, and the basis for this. It may also be important to discuss this with the patient's family and other clinicians involved in the patient's care, with the patient's consent. HDC does receive complaints where different clinicians have formed different views on competence over time. In such circumstances, clear and effective communication with all the parties is very important.

Conclusion

All adults have the same rights to individual autonomy and to decide what happens to them and their bodies regardless of their age. If they are unable to make decisions for themselves, they still have the right to be treated with respect and dignity. It is important that doctors, family members, and attorneys are aware of the law with regard to the provision of treatment to people who can no longer make decisions for themselves.

Meenal Duggal, Deputy Commissioner - Complaints Resolution

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