

GP's Role in Power of Attorney

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GPs play an important role in granting a lasting power of attorney (LPA) under the Mental Capacity Act 2005 which applies to England and Wales. LPA replaced enduring power of attorney (EPA) on 1 October 2007. The purpose of the change was to help and protect people who lack capacity and to enable others to prepare in advance for a time when they may lack capacity.

Wider powers

Unlike EPAs which were restricted to property and money, LPAs also cover making decisions over medical treatment and welfare. So an attorney can take decisions on clinical treatment and interventions that normally only the patient can take subject to any conditions or restrictions contained in the LPA. Granting LPA is a significant step and vulnerable people need to be protected.

A new LPA is effective once it is registered with the Office of the Public Guardian. It cannot be registered without a signed certificate from a reputable person, usually a GP, confirming that the donor (the person giving the LPA) is of sound mind.

Assessing capacity

The Act sets out a clear test for assessing whether a person lacks capacity to take a particular decision at a particular time. The GP must meet the donor alone. This is to ensure that a carer, the proposed attorney or relatives are not influencing the donor.

It is a decision-specific test. No one can be labelled 'incapable' as a result of a specific medical condition or diagnosis. Section 2 of the Act makes clear that a lack of capacity cannot be established merely by reference to a person's age, appearance, or any condition or aspect of a person's behaviour which might lead others to make unjustified assumptions about capacity.

Mental impairment

Section 2 states: 'A person lacks capacity in relation to a matter if at the material time he [or she] is unable to make a decision for himself in relation to the matter because of an impairment of or a disturbance in the functioning of the mind or brain'.

Section 3 covers evaluating how a person functions, their skills and abilities and particularly whether they are unable to make certain decisions. Section 3(1) states that a person cannot make a decision for themselves if they are unable to understand and retain relevant information presented to them, use and weigh up that information, then communicate a decision.

Medical evaluation

A person lacks capacity if they are unable to make a decision in relation to a particular matter because of an impairment of or disturbance in the function of the mind or brain. This can be termed the diagnostic approach where consideration is given to the donor's

medical condition and how it affects their ability to make decisions.

The medical evaluation should be specific to the decision under consideration at that time and it does not necessarily mean a donor is unable to make other decisions.

For instance if a person has been diagnosed with dementia, when is it severe enough to prevent them making this decision? There would need to be a medical diagnosis confirming the medical condition and its severity.

Functional approach

If there is no impairing condition but there are doubts about a donor's capabilities then the functional approach should be explored. For example, significant learning difficulties or delirium might be considered impairments or qualify as a disturbance- see box.

Section 3 of the Act states that a person is unable to make a decision for themselves if they are unable to perform any of the four functions below - for example, they cannot retain information. This approach assesses mental capacity by examining what the person is able to do and is therefore more complex than the diagnostic approach. There may be fluctuations of time between tasks or a response to explanations about decisions.

The Act requires GPs to take more practical steps. These are to help the donor in the decision-making process; encourage their participation in decision making and encourage them to improve their decision-making abilities.

Assessing capacity

If the person understands an explanation of the proposed treatment illustrated in simple language or using visual aids, that is a measure of capacity. If the information is only retained for a short period of time, this does not exclude the person from being able to make a decision.

An assessment must take place where there are doubts about the capacity of the donor to make a decision.

Anyone involved in the care or management of the donor with a concern as to the donor's decision-making capabilities can request an assessment.

Revoking power of attorney

People who are elderly or have a degenerative medical condition are not the only ones who should be considered taking out an LPA. We do not know what is in store for us and arguably, for the same reason we should all make a will, I believe we should all have a LPA drawn-just in case. The donor can revoke a LPA provided that they still have mental capacity.

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