FACTSHEET

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Enduring Powers of Attorney and Wardship

This factsheet sets out the current legal mechanisms available for patients who lose capacity to manage their own affairs: *Enduring Powers of Attorney* and *Wardship*, and explains the role of doctors in both processes. It is important to be aware that new legislation (the Assisted Decision-Making and Capacity Act 2015), introducing changes to the current mechanisms, has been passed but is not yet operative (see below). Medisec will provide an update when the changes set out in the legislation take effect in practice.

Enduring Power of Attorney (EPA) - What is an EPA?

An EPA is a legal document, usually drafted by a solicitor, to allow a person (known as the donor) with full capacity the opportunity to plan for their future. The donor nominates a person (who will be called "attorney") to take control of the donor's assets in the event that the donor loses capacity. The control assigned to the attorney can also include (or can be limited to) personal care decisions.

At the moment, until the relevant provisions of the Assisted Decision-Making and Capacity Act 2015 come into effect, an EPA allows the attorney to make decisions regarding a donor's personal care. For example, the attorney can make a decision as to the people the donor sees, their day-to-day diet, where the donor lives and may assist with housing, social welfare and any other benefits. Currently, personal care decisions under an EPA do not include healthcare or end of life decisions but this is set to change under the new legislation (see below).

It is a very serious step to take for a donor to transfer control of their assets and / or personal care decisions to another person. As a result of this, certain specific documents must be executed at a point in time when the donor understands the nature and effect of what they are doing. A solicitor and doctor are required to be involved in the process.

How an EPA is made

There are a number of documents involved in creating a valid EPA, including:-

1. A statement from the donor's doctor confirming that the donor had mental capacity when they originally executed the document and they understand the effect of preparing such a document. This statement of capacity should ideally be signed by the donor's doctor within 30 days of the signing of the EPA by the donor.

2. A statement from a solicitor that the donor understood the effect of creating the Power of Attorney.

3. A statement from a solicitor to say that the donor was not acting under the influence of any person involved in the donor's life.

4. A statement from the donor themselves to confirm that they understand the effect and consequences of the Power of Attorney.

5. At least two people, neither of whom is the intended attorney, must be notified of the making of the EPA, one of the notice parties has to be a spouse or civil partner or a child. If a situation arises where there is no spouse, civil partner or child of the donor then a relative must be notified such as a parent, sibling, grandchild, niece or nephew etc.

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Doctors' role in the EPA process

Doctors are called upon to certify capacity at two stages in the EPA process:

1. When the donor signs the EPA in the first instance nominating their attorney

A doctor will be asked to complete a certificate along the lines of the following, in order to prove the patient has capacity to execute an EPA.

> *"I, XXXXX, a registered medical practitioner of [ADDRESS] hereby state that in my opinion at the time this document was executed by the donor YYYY had the mental capacity, with the assistance of such explanations as may have been given to the donor, to understand the effect of creating the power.*
>
> *Signed:*_____
>
> *Dated:*_____*"*

While the donor's solicitor is required to discuss the EPA and its consequences with the donor, a doctor should explain the consequences of the transfer of the donor's personal care decisions to the attorney.

2. When the donor loses (or is about to lose) their mental capacity

The EPA only comes into effect once the donor loses capacity and the EPA is registered with the Registrar of the Wards of Court Office. The patient's solicitor must take certain steps to register the EPA at the point in time when the donor loses capacity, or if they are starting to lose capacity.

At this stage, the patient's solicitor will send the doctor a form entitled: *"Enduring Powers of Attorney Regulations 1996, Notice of Intention to apply for Registration."*

A doctor will also be asked in this form to certify that the donor is or where appropriate, is becoming, incapable by reason of a mental condition, of managing and administering his / her own property and affairs.

The certificate / medical report must include the following information:

1) The date, place, duration and circumstances in which the medical examination was carried out.
2) The nature and duration of any prior relationship between the medical practitioner and the patient.
3) The nature of the examination carried out and details of the test and /or capacity tools deployed for the purpose of conducting whether the donor is or is becoming incapable of managing his or her affairs.
4) Whether in the opinion of the registered medical practitioner, the donor is or is becoming incapable of managing his or her affairs.
5) Where the medical practitioner is of the opinion that the donor is or is becoming incapable of managing his or her affairs he / she should state:

    I. the nature of the patient's illness / condition
    II. the likely date of onset of that illness / condition
    III. the symptoms pertaining to that illness / condition
    IV. the evidence relied upon making their diagnosis; and
    V. whether the illness/ condition is permanent or likely to improve.

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As a safeguard, this form also provides the doctor an opportunity to object to the registration of the EPA with the High Court within five weeks, if they believe the patient does have capacity.

The EPA ceases upon the death of the donor, or in other certain specific circumstances. For example, a donor can revoke the EPA before registration occurs in the High Court while they continue to have capacity.

If a doctor considers it beyond their expertise to assess a patient's capacity, they can consider referring the patient to an appropriate specialist.

Wardship

In some circumstances where a patient does not have an EPA in place, and they become unable to manage his / her assets because of mental incapacity, an application may be made to the courts for them to become a Ward of Court.

The application is usually made by a family member (called a "petitioner"), with the assistance of a solicitor. The application must include the opinion of two doctors, one of whom is often the patient's GP. The President of the High Court decides whether to conduct an Inquiry into the proposed Ward's capacity and if so, the proposed Ward is examined by a doctor appointed by the court.

The court must then decide whether the person is capable of managing his or her own property and in order to reach that decision it must be satisfied the person is of "unsound mind". If this is the case, the person is made a Ward of Court and a "Committee" (usually a family member) is appointed to control assets on the Ward's behalf.

Doctors' role in Wardship applications

Doctors may receive requests from a petitioner's solicitor asking them to swear an affidavit or to provide a medical report, which will be appended to an affidavit, regarding the patient's capacity. This affidavit or medical report will be used to support a wardship application. An affidavit is a written sworn statement of fact.

If the doctor concludes it is in the patient's best interests to proceed, they should conduct an assessment for the purposes of the application. An assessment of the patient must have been carried out within three months of the presentation of the petition.

At the outset, the doctor should explain the purpose and consequences of the assessment to the patient, including the fact that their information will be disclosed to the solicitor and obtain their consent to proceed. If the doctor believes the patient has capacity and the patient does not consent to the assessment and / or the disclosure of the patient's information to the solicitor, then the doctor should not proceed.

If the patient lacks capacity to consent to the process, the doctor should consider whether a wardship application to have their affairs managed is in the patient's best interests in the circumstances. As the affidavit required to support a wardship application is a sworn document required by the President of the High Court, it would be assumed that this step is in the patient's best interests and required by the High Court in order to grant the Order to make the patient a Ward of Court. As always, doctors should take detailed notes of their decision-making process. If in certain circumstances, a doctor considers it beyond their expertise to assess a patient's capacity, they can consider referring the patient to an appropriate specialist.

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The following information must be included in the medical report or affidavit:

- The date of the medical examination
- The place of the medical examination
- The duration of the medical examination
- The circumstances in which the medical examination was carried out
- The nature and length of any prior relationship between the doctor and the patient
- Details of any medical tests administered.

The medical practitioner must state whether or not, in their professional opinion, the proposed ward is of unsound mind and incapable of managing their affairs. If this is the case, the report should outline:

- The nature of the illness or incapacity
- The approximate date of onset of the illness or incapacity
- The symptoms of the illness or incapacity
- The medical evidence relied on by the medical practitioner
- The permanency or otherwise of the illness or incapacity.

Doctors should view affidavits in the same way as if they were giving evidence in Court under oath and realise that they could in the future be questioned on the truth of the affidavit. Doctors must ensure that they are satisfied with the wording of the affidavit and not feel intimidated or pressurised into swearing one. Doctors can ask solicitors to amend the wording of any affidavit before swearing.

When a doctor is happy with the content of the affidavit, they must sign it in front of a Commissioner for Oaths or practising solicitor, who will check the identity of the doctor swearing it. The doctor will be asked to take an oath on the bible or make an affirmation before signing.

The solicitor presenting the application must put the affidavit before the President of the High Court within two months from the date that the affidavit is sworn, so it should be completed and returned to the solicitor promptly.

Legislation and guidance

As above, doctors will be aware of new legislation that has passed but not yet operative, that will impact decision-making in such situations in the future. The Assisted Decision-Making (Capacity) Act 2015 was signed into law on 30 December 2015 but the majority of the Act has not yet commenced.

In summary, the important features of the Act that will be relevant to doctors include:

- Presumption of decision-making capacity unless the contrary is shown.
- Establishment of a more modern regime for EPAs which may relate to a donor's property and/or personal welfare, and which may now also include healthcare matters.
- Provision of tiered legal frameworks providing for the appointment of a "Decision-Making Assistant", a "Co-Decision-Maker" and a "Decision-Making Representative".
- Abolition of the Wards of Court system. It is planned that there will be a review of all existing Wards within a period of three years with a view to either discharging them fully or transitioning to the new decision making structure.
- A legal framework facilitating the making of legally binding Advance Healthcare Directives.

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Advance Healthcare Directives

Even though the relevant sections of the Act has not yet commenced, courts in Ireland have recognised the right of a person to make an "Advanced Healthcare Directive" stating in advance what end of life or other healthcare he/she wishes for in a given situation. The Medical Council Guidelines and HSE Consent Policy also recognise the right of a person to make an advanced healthcare directive.

Patient who lacks capacity and does not have an Advance Healthcare Directive

If a healthcare decision needs to be made about a patient with no advance healthcare directive, the clinical decision can be made by the treating doctor in the patient's best interests.

If the patient has an EPA in place, and the attorney is aware of what the donor (patient) would have wanted in the circumstances, a doctor should take that into account, as well as the next of kin's wishes, in accordance with Medical Council Guidelines.

The Medical Council Ethical Guide states in paragraph 10.6:

> *If there is no-one with legal authority to make decisions on the patient's behalf, you will have to decide what is in the patient's best interests. In doing so, you should consider:*
>
> - *which treatment option would give the best clinical benefit to the patient;*
> - *the patient's past and present wishes, if they are known;*
> - *whether the patient is likely to regain capacity to make the decision;*
> - *the views of other people close to the patient who may be familiar with the patient's preferences, beliefs and values; and*
> - *the views of other health professionals involved in the patient's care.*

Healthcare Decisions on behalf of a Ward of Court

Where an adult has been made a Ward of Court, the President of the High Court has authority to make decisions on consent to medical treatment for that person. After obtaining medical advice, medical treatment matters should be referred by the Committee of the Ward or by the clinical director of the relevant hospital to the Registrar of Wards of Court. In practice, the Registrar has delegated authority from the President of the High Court to consent to the carrying out of routine and non-controversial procedures in consultation with the person's next of kin.

Where procedures are considered to be non-routine or there is a higher element of risk involved the consent of the President of the High Court must be obtained in relation the carrying out of a medical procedure including the administration of a general anaesthetic. When a court makes a healthcare decision in respect of a person who has been made a Ward of Court, they will do so in the best interest of the Ward.

Please see our related factsheets on *Consent*, *Assessing Capacity for Medical Treatment* and *Testamentary Capacity*, available on our website. Medisec frequently receives queries regarding doctors' roles in the execution of EPAs and wardship applications. If you have any specific queries, contact Medisec for further advice.

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