Patients and Powers of Attorney

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Where patients are suffering from mental disorder, one of the early questions asked is how best their financial affairs can be managed. Very often, in the case of elderly people, bills have been left unpaid, letters unopened and even court summonses unattended to. They may need to move to a nursing home or other residential care and their house or flat may need to be sold to pay fees. Until 1986, the only valid way of arranging for patients' financial affairs to be looked after (except in the simplest of cases) was by application to the Court of Protection, who could appoint a receiver to stand in the patient's shoes or make a 'short procedure' order to cater for patients whose assets were small and easily-managed.[1]

People who cannot manage their own affairs, because of physical disability, absence abroad or something of that kind, are able to create a power of attorney, choosing someone else to act on their behalf. The commonest form of power of attorney is the one prescribed by the Powers of Attorney Act 1971, which simply reads as follows:

> THIS GENERAL POWER OF ATTORNEY is made this day of 19 by AB of I appoint CD of [or CD of and EF of jointly (or) jointly and severally] to be my attorney[s] in accordance with section 10 of the Powers of Attorney Act 1971.
> IN WITNESS etc.

However, that power of attorney will lose its force when the person who had created it becomes incapable mentally of understanding the power and of withdrawing it. In other words, at the very time when most lay people would expect the power to be most useful, the law says it becomes useless. The power can be revoked by the person creating it at any time before mental incapacity and will lose its effect automatically, by operation of law, when the donor becomes mentally incapable of managing his or her property and affairs.

This state of affairs has led to a change in the law. From the date when the Enduring Powers of Attorney Act 1985 came into force (10 March 1986) it has been possible, providing certain conditions are fulfilled, for a person to create a particular kind of power of attorney which will endure beyond the onset of mental incapacity.

The main conditions are these:

(1) The enduring power of attorney (EPA) must be in the right form. (This is now the form set out in the Enduring Powers of Attorney (Prescribed Forms) Regulations 1987, which, from 1 July 1988, will entirely replace the original form prescribed under the 1985 Act).
(2) The EPA must include all the prescribed information, so that the person creating it ('the donor') and the person appointed to act ('the attorney') can see exactly what the consequences of signing it are.
(3) The power may give complete freedom ('general authority') to the attorney or may relate only to specific parts of the donor's property or affairs, or may be restricted in other ways.
(4) If more than one attorney is appointed, the EPA must say whether they are to act jointly (that is, they must both or all act together on every occasion) or jointly and severally (that is, they may act together or they may act separately, as they choose).
(5) An attorney cannot pass on his attorneyship to someone else.
(6) The donor and the attorney(s) must sign the EPA in the presence of at least one witness each. (There is no requirement for a witness to be a registered medical practitioner or a solicitor).
(7) When the attorney believes that the donor is becoming or has become mentally incapable of managing his or her property and affairs, the attorney must apply to the Court of Protection for the EPA to be registered, having first given written notice to the donor and the donor's nearest relatives of the intention to apply for registration.

The medical profession is likely to be involved in these questions at several points:

(1) When a person's mental capacity first comes into question (and this may not necessarily be in old age, although often it is), the family will no doubt consult the patient's usual doctor, to try to decide whether any arrangements are needed to help the patient manage. This can give rise to problems of confidentiality but a tactful request to the patient for leave to discuss the future, for the patient's own peace of mind, can be a way forward. If the doctor thinks that the patient is able to cope, mentally, but has increasing physical disabilities, then the traditional, non-enduring power of attorney may be a less distressing alternative than an EPA for the patient to consider. Of course, the patient's solicitor should be consulted by the patient or family as well.
(2) If advice is sought as to whether an application to the Court of Protection is needed for the appointment of a receiver or a short procedure order, the question is whether the patient is incapable, by reason of mental disorder, of managing and adminstering his or her property and affairs. This is the test laid down in the Mental Health Act 1983. Most doctors will be familiar with the 'Notes to accompany certificate of incapacity'

sent out by the Court of Protection with the blank form of medical certificate. The notes give help in completing the certificate.

(3) If the patient has become so mentally incapable that he or she fails to understand what a power of attorney is and what it does, any non-enduring power of attorney will have ceased to have effect. Obviously, at that stage, it would be wrong to suggest the creation for the first time of either a non-enduring power of attorney or an EPA. An application for a receivership will probably be necessary.

(4) The question of the degree of capacity needed by someone who wishes to create an EPA has recently been considered by the Courts in a case called 'Re K'. It was decided in that case that an EPA can be valid if the donor is already becoming incapable but is able to understand the nature and effect of an EPA.

How do you test the donor's understanding? Remembering that the EPA may give unlimited authority to the donor, or authority limited only to certain property or affairs, or may be restricted in other ways, you should ask whether the donor is able to understand that the power means:

(a) (if such be the terms of the power) that the attorney will be able to assume complete authority over the donor's affairs, and

(b) (if such be the terms of the power) that the attorney will in general be able to do anything with the donor's property which the donor could have done, and

(c) that the authority will continue if the donor should be or become mentally incapable but that, in that event, the power will be irrevocable without confirmation of the Court of Protection.

If the donor can understand all those aspects, a valid EPA can be created.

(5) Even if a valid EPA is a possibility, it may be that there is nobody available that the patient would choose as an attorney. In that event, if the patient is mentally incapable, it will be necessary to use one of the more traditional Court of Protection remedies.

(6) It should be noted that there is no requirement in the Enduring Powers of Attorney Act 1985 for medical evidence to be obtained at any stage; nevertheless, experience of the working of the Act has shown that it can be extremely helpful if the patient happens to have been examined with the question of mental capacity in mind:

(a) when doubts first arise

(b) when an 'ordinary' power is being considered

(c) when the continuing validity of an 'ordinary' power is in question

(d) when an EPA is being explored and when it fails to be considered whether the patient understands the nature and effect of an EPA in order to be able validly to create one

(e) when it is being decided whether the time has come for the attorney(s) to apply for registration of an EPA (is the patient becoming incapable, or has he or she become incapable?)

(7) After the decision in Re K, the question has been raised as to whether a patient who is already within the jurisdiction of the Court of Protection, and for whom a receiver has already been appointed, can nevertheless create a valid EPA if he or she can pass the tests mentioned in 4(a), (b) and (c) above. The answer is probably no; there are cases from earlier in this century deciding that the appointment of a receiver takes away the patient's ability to create valid deeds. The decisions predated the Mental Health Act 1959 and therefore use archaic terminology ('committee', 'person so found by inquisition'), but the principle seems clear.

(8) One final procedural aspect sometimes involves medical evidence. If an EPA is to be registered, the donor must first be given personal notification in a prescribed form that it is the intention of the attorney(s) to apply for registration. Obviously, the reason for this requirement is to enable the donor to object if he or she believes that registration is premature, or in case there is any suggestion that the EPA was obtained by fraud or undue pressure, or if there is any other valid objection. It is most important that donors should have the opportunity to object. However, there is power for the Court to dispense with notification in some cases. This power is rarely exercised but would be considered if the donor's doctor were of the opinion that notification would cause physical harm or distress to the donor. If you are asked to support an application to dispense with notification, please say if you believe that notification would be harmful. It would not generally be considered a good enough reason that the donor is incapable of understanding the notice; in the nature of things, this would apply in many cases, but the donor is still entitled to have the chance to learn what is going on if, for example, a lucid interval should occur.

The Court has prepared some notes with guidance to doctors regarding powers of attorney, along the lines of this article. The notes are available to College members from: The Registrar, The Royal College of Psychiatrists, 17 Belgrave Square, London SW1X 8PG.

Reference

[1] MACFARLANE, A. R. (1985) Medical evidence in the Court of Protection. *Bulletin of the Royal College of Psychiatrists*, **9**, 26–28.

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