Doctors acting as health and welfare attorneys for their patients – a guidance note

February 2012

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Summary box

In the BMA’s view there is nothing to prevent doctors accepting requests from patients to act as health and welfare attorneys. Any such request should nevertheless be considered carefully as it may involve some risk of exposing health professionals to potential conflicts of interest. In particular doctors should avoid acting as attorneys where there are actual or perceived financial conflicts of interest. In addition, in the BMA’s view doctors acting as health and welfare attorneys should not be involved in the preliminary assessment of the patient’s capacity prior to the power being used.

Introduction

The Mental Capacity Act (2005) (MCA) replaced Enduring Powers of Attorney (EPAs) with a new form of power of attorney, the Lasting Power of Attorney (LPA). Unlike EPAs, which relate only to property and affairs, LPAs come in two forms, the property and affairs LPA and the health and personal welfare LPA (HWLPA). An HWLPA covers personal, welfare and health care decisions, including decisions about medical treatment. The BMA has been asked to comment on how doctors should respond to requests from patients to act as health and welfare attorneys and our views are set out below. This guidance note relates specifically to doctors who are likely to be involved in the provision of future care to the patient making out the power of attorney (the donor). It does not apply to doctors who wish to act as attorneys to individuals with whom they have no professional relationship. Further information on Lasting Powers of Attorney, and on the provision of medical treatment to patients lacking mental capacity, is available from the BMA’s Medical Ethics Department. Any doctor considering acting as an attorney should also familiarise themselves with the MCA Code of Practice.

What is a Lasting Power of Attorney?

A Lasting Power of Attorney allows an individual (the donor) to give authority to someone else (the attorney) to make decisions on the donor’s behalf. The donor decides who the attorney should be and how wide-ranging the power should be. More than one attorney can be appointed and they may be appointed to make some decisions ‘jointly’, ie together, and some ‘jointly and severally’, ie independently. If the LPA does not specify this then attorneys must act jointly. Where a health professional is appointed to act ‘jointly’ many of the concerns addressed in this guidance will not arise. Although a property and affairs LPA can be used by the attorney even when the donor has capacity, an LPA dealing with personal welfare can only operate if the individual lacks capacity in relation to the issue in question.

Health and Welfare Powers of Attorney

Creating and registering an HWLPA

In order to create an HWLPA an individual must be aged 18 or over and have the necessary mental capacity. It has to be created using a specified form and must state that it applies to health and welfare decisions at such a time as the individual creating it loses capacity to make those decisions. It must also contain a certificate, signed by an independent person chosen by the donor – either someone known to the individual for over two years or a professional – stating that in their opinion, at the time the HWLPA is created, the donor understands what is involved in making it and has not been put under undue pressure to do so. An HWLPA does not give the attorney authority to refuse life-sustaining treatment unless it is explicitly stated on the form. The individual creating the HWLPA can also set a variety of conditions and limits on the powers given to the attorney.
An HWLPA cannot be used until it has been registered with the Public Guardian. Although it can be registered before the individual loses capacity, unlike a property and affairs power of attorney, it cannot be used until the individual loses the capacity to make the specified decisions.

Scope of a HWLPA
Where an individual lacks capacity to consent to a specified medical treatment, an attorney nominated by means of an HWLPA can consent or refuse treatment on his or her behalf. An attorney with relevant powers must be consulted unless an emergency makes such consultation impossible. There are however a number of restrictions placed on the attorney:

• The scope of an attorney’s authority must be specified on the face of the HWLPA and attorneys cannot act beyond it
• Any act or decision made under the power of an HWLPA must be in the incapacitated person’s best interests
• An attorney cannot make a decision if the donor has capacity at the time to make the decision
• If the donor has previously made a valid advance decision refusing the specified treatment, the advance decision takes priority unless the HWLPA was made after the advance decision and gives the attorney the right to make the specified decision
• The decision of an attorney can be overridden where the donor is being treated for a mental disorder under mental health legislation

Responsibilities of an attorney
In law, the attorney acts as an agent of the donor. As an agent the attorney is bound by a number of common law duties toward the donor of the power, including the duty to act with due care and skill, to act in good faith, not to delegate his or her functions to another, to keep the donor’s affairs confidential apart from where the disclosure of information is permitted by the HWLPA or is otherwise required. In legal terms the duty of the attorney is said to be ‘fiduciary’ and like all fiduciaries the attorney should not benefit personally from the relationship. Financial conflicts of interest should therefore be avoided. These are discussed in greater detail below. As indicated above, the attorney has a responsibility to act within the scope of the HWLPA.

Who can be an attorney?
There is nothing that currently prevents a health professional acting as attorney to a patient. In relation to HWLPAs the MCA stipulates only that the attorney must be an individual – and not therefore a ‘trust corporation’ – and aged 18 or over. In addition the Code of Practice states, not unreasonably, that ‘an attorney should be someone who is trustworthy, competent and reliable. They should have the skills and ability to carry out the necessary tasks.’ In addition the Code states that ‘A paid careworker (such as a care home manager) should not agree to act as an attorney, apart from in unusual circumstances (for example, if they are the only close relative of the donor).’

Nominating health professionals as HWLPAs
There are many occasions where patients will have had long-term professional relationships with individual doctors. When considering the possibility of future mental incapacity, some patients may want to consider appointing their doctors as attorneys. They may not have anyone else close to them who they would wish to appoint, or they may consider the doctor’s professional knowledge of their

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2 Mental Capacity Act 2005 s10 (1) (a).
4 Ibid. Para 7.10
health condition, and, through long acquaintance, of their underlying beliefs and wishes, makes them ideally placed to make health and welfare decisions on their behalf. They may also feel that a doctor’s professional distance would make it easier for them to make difficult decisions, such as withdrawing or withholding life-sustaining treatment, decisions that might be difficult for those emotionally close to the patient. Although, as indicated above, in the BMA’s view there is nothing to prevent a doctor acting as a health professional in these contexts, doctors should nevertheless, as the MCA Code of Practice stresses, give careful consideration to the nature of an attorney’s responsibilities. The following factors should also be taken into account.

Financial conflicts of interest
When considering whether to agree to such a request, there are a number of factors that doctors should take into account and these are set out in more detail below. Importantly though, in the BMA’s view, and bearing in mind the attorney’s fiduciary duties, doctors should decline to act as attorneys where there is a financial conflict of interest. In the BMA’s view it would be inappropriate, for example, for health professionals to act as attorneys where they are beneficiaries of the patient’s will. Doctors should also decline to act as Attorneys where the patient is likely to be treated in an institution in which the doctor has a financial interest. When considering a request to act as health and welfare attorney therefore, doctors should give careful consideration to the likelihood that financial conflicts of interest, either real or perceived, are likely to arise.

The loss of an independent voice
Consent to treatment is ordinarily regarded as a dialogue. Following investigation and discussion, the health professional proposes, where appropriate, a course or courses of treatment, and it is for the patient, or relevant proxy, to consent or refuse, based upon an assessment of the patient’s interest that is independent of the views of the health professional. If the proposer of the treatment also has the capacity to consent to it, a voice or view independent of the treating professional is lost. Where doctors have particular concerns it can be helpful to request a second opinion or to discuss the matter with a colleague, bearing in mind duties of confidentiality.

Serious medical treatment
Ordinarily, under the Mental Capacity Act, if a decision involves serious medical treatment, and there is no one available whom it is appropriate to consult, an independent mental capacity advocate (an IMCA) would have to be enrolled. Where, however, a treating health professional is nominated as an attorney, this independent viewpoint would be lost. In the BMA’s view, in these circumstances, a second opinion should be sought. Regulations define ‘serious medical treatment’ as treatment for physical or mental conditions:

Which involve giving new treatment, stopping treatment that has already started or withholding treatment that could be offered in circumstances where:

• If a single treatment is proposed there is a fine balance between the benefits and burdens to the patient and the risks involved
• A decision between a choice of treatments is finely balanced, or
• What is proposed is likely to have serious consequences for the patient
• ‘Serious consequences’ are those which could have a serious impact on the patient, either from the effects of the treatment itself or its wider implications.\(^5\)

Assessing capacity

A registered HWLPA can only be used once it has been established that an individual lacks capacity with regard to the specific health decision that needs to be made. In the BMA’s view, where a health professional has been nominated as an attorney, they should not be involved in the initial assessment of capacity that would permit the power of attorney to be used. An HWLPA can only be used for decisions that the patient lacks the capacity to take and it follows that attorneys need to be sensitive to any capacity the patient may have in relation to any subsequent decisions.

Sources of further advice

*Mental Capacity Act Code of Practice.*

Office of the Public Guardian
http://www.publicguardian.gov.uk/

British Medical Association
*Mental Capacity Act Toolkit*
http://www.publicguardian.gov.uk.

British Medical Association and Law Society
*Assessment of Mental Capacity 3rd Edition*