

# Power of attorney

Legislation designed to protect incapacitated adults aims to ensure that patients who cannot make or communicate decisions for themselves about medical treatment have those decisions made on their behalf, in their best interests.

The law varies throughout the UK and doctors should have a good working knowledge of those which apply in their own jurisdiction. Despite these variations, there are a number of common themes:

- Decisions must be made on the basis of most benefit to/best interests of the patient.
- If there is more than one treatment option, the least restrictive option should be preferred.
- Account should be taken of the patient's previously expressed wishes, if known.
- The views of relatives and carers should be taken into consideration.

Provisions exist for a legally recognised medical proxy decision-maker to be appointed by the patient before capacity is lost (welfare power of attorney in Scotland, lasting power of attorney in England and Wales, enduring power of attorney in Northern Ireland). These powers cannot be exercised until the patient has lost capacity. Once capacity is lost, if there has been no such appointment, it is possible to apply for a court-appointed decision maker (welfare guardians in Scotland, court appointed deputies in England and Wales, and controllers in Northern Ireland).

Similarly, in each jurisdiction, there exist two types of attorney: one who deals with matters of a health and welfare and another who deals with property and financial affairs. While one named individual can act as both types of attorney, it is *only* the health and welfare attorney that can make medical decisions in the best interests of the patient.

Key differences across UK jurisdictions include the requirement in Scotland to complete a prescribed certificate of incapacity form for treatment administered under the Act, which can be signed by doctors, but also by appropriately trained dentists, nurses and opticians. In England, specific provision is made for independent mental capacity advocates to be appointed to support an incapable adult who has no family or friends. Advance decisions refusing treatment are recognised as legally binding in England and Wales only.

## Basic considerations

GMC guidance on *Decision making and consent* explains that:

- *No one else can make a decision on behalf of an adult who has capacity* (Paragraph 65).
- *You must start from the presumption that every adult patient has capacity to make decisions about their treatment and care.*

*You must not assume a patient lacks capacity to make a decision solely because of their age, disability, appearance, behaviour, medical condition (including mental illness), beliefs, their apparent inability to communicate, or because they choose an option that you consider unwise (Paragraph 81).*

## **Common pitfalls**

- A power of attorney not legally registered (with the Office of the Public Guardian in Scotland, England and Wales or the Office of Care and Protection in Northern Ireland) will not be valid.
- A power of attorney appointed to deal with health and welfare matters only comes into force when the patient is incapable of decision-making. If capacity is retained, treatment can be provided, applying the normal rules of consent.
- Power of attorney loses all power on death of the patient. If the individual wants information or access to records after the patient's death the Access to Health Records Act (1990) applies. In addition GMC Confidentiality Guidance (para 137) provides that you should usually disclose relevant information about a patient who has died:
- *When someone close to an adult patient asks for information about the circumstances of that patient's death, and you have no reason to believe that the patient would have objected to such a disclosure; and*
- *When disclosure is necessary to meet a professional duty of candour.*

In addition, there are circumstances in which a relative might be entitled to apply for access to the deceased's records under the AHRA 1990.

- Disclosing confidential information about an adult with incapacity without consent or other lawful basis.
- Power of attorney can be for financial or welfare decisions or both. Only powers covering welfare would be relevant for medical treatment decisions.
- Never assume a patient lacks capacity to make a decision based solely on a factor such as a medical condition or mental illness.
- Patients with diminished capacity may still be able to make simple decisions about their care, even if they are unable to decide on more complex matters.
- In Scotland, relying on a power of attorney for decision making in relation to non-emergency treatment without also completing a section 47 certificate of incapacity (both are required).

## **Key points**

- Ensure you are familiar with the applicable laws in your jurisdiction.
- Never assume that a patient lacks capacity; if you suspect that a patient may lack capacity, you must undertake an assessment of capacity in relation to the specific treatment decision which requires to be made.
- A welfare power of attorney can only act on a patient's behalf when the patient lacks capacity.
- Further advice can be obtained from MDDUS in relation to case-specific queries.

## Further guidance

- GOV.UK. *Make, register or end a lasting power of attorney*: <https://www.gov.uk/power-of-attorney>
- Office of Public Guardian (Scotland). *Power of attorney*: <http://www.publicguardian-scotland.gov.uk/power-of-attorney>
- NI Direct Government Services. *Managing your affairs and enduring power of attorney*: <https://www.nidirect.gov.uk/articles/managing-your-affairs-and-enduring-power-attorney>
- GMC. *Decision making and consent*: <https://www.gmc-uk.org/ethical-guidance/ethical-guidance-for-doctors/consent>
- <https://www.gov.scot/publications/adults-incapacity-scotland-act-2000-code-practice-third-edition-practitioners-authorised-carry-out-medical-treatment-research-under-part-5-act/>
- <https://www.gov.scot/publications/section-47-certificate/>
- Mental Capacity Act Code of Practice: <https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice>