Advance health directives

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Case histories are based on actual medical negligence claims or medicolegal referrals, however, certain facts have been omitted or changed by the author to ensure the anonymity of the parties involved.
The aim of this article is to outline the legislative framework in relation to advance health directives and enduring powers of attorney or guardianship, with a particular focus on the medical and legal issues of relevance with respect to an assessment of mental capacity.

Case history

In May 2006, the general practitioner received a phone call from a solicitor who was acting for the daughter of one of his elderly patients. The solicitor requested information about the patient's mental capacity. The GP asked the solicitor to put his request in writing and did not provide any information over the phone about her patient. Later that week the GP received a letter from the solicitor confirming his request for information about the patient's mental capacity. The solicitor enclosed a copy of an Enduring Power of Attorney form, which nominated the daughter as the patient's enduring power of attorney. The form had been signed by the patient in February 2006. In the letter to the GP, the solicitor advised that the patient's daughter needed the information about her father to 'assist with a possible application to the Guardianship Tribunal to protect the assets and interests' of the patient. The letter also asked the GP to keep the letter and recent telephone conversation 'private and confidential' because of the 'delicacy of this situation'. The GP was not sure if she was required to provide the information to the solicitor and contacted her medical defence organisation for advice.

The general practitioner told the medicolegal adviser that the 80 year old patient had recently re-married. The GP understood that, over the past few months, the patient had been selling some properties that he owned. The GP noted that the patient had some dementia. When she had last tested the patient's Mini Mental State Examination (MMSE) in January 2006, it was 25/30. The GP had informed the patient about the request for information from the daughter's solicitor and the patient had asked the GP not to provide a report. When asked if she thought the patient had capacity to make financial decisions and/or sign the Enduring Power of Attorney form in February 2006, the GP said that she was not certain. After considerable discussion, it was decided that the GP would not respond to the request from the daughter's solicitor and would simply wait for contact from the Guardianship Tribunal.

Discussion

Powers of attorney are formal instruments whereby one person appoints another to act on their behalf. Traditionally, powers of attorney did not include the delegation of personal health care decisions such as consent to medical treatment. Enduring powers of attorney were introduced to overcome the problem concerning the termination of powers of attorney on the loss of mental capacity of the donor. By statute, enduring powers of attorney allow an attorney to continue acting on behalf of the donor, notwithstanding the donor's loss of mental capacity. Legislation in some jurisdictions has permitted enduring powers of attorney to also make 'personal' decisions, including health care decisions.

An advance health directive contains instructions that consent to, or refuse, the future use of specified medical treatments. It becomes effective in situations where the patient no longer has the capacity to make their own treatment decisions. Advance health directives depend on an assessment of capacity for their execution, and of incapacity for their implementation. Legislation currently exists in the ACT, Northern Territory, Queensland, South Australia and Victoria which provides for advance health directives, although the terminology, format and complexity varies in each jurisdiction.

Who can execute an enduring power of attorney or advance health directive?

The general rule is that a person over 18 years of age of legal capacity may execute a power of attorney or an advance health directive. The extensive powers that a donor may delegate to an agent, including medical, financial and personal decisions, highlights the importance of ensuring that the donor is at a satisfactory level of mental capacity at the time of the delegation. In line with the current philosophy of autonomy and self determination, the responsibility for making the choice of substitute decision maker in the event of loss of capacity has shifted from the courts to the individual, with the court or relevant guardianship and administration tribunal empowered to intervene if necessary in instances of abuse or dispute.

How do I determine whether a patient has the mental capacity to execute an advance directive and/or appoint an attorney to make health care decisions?

The assessment of mental capacity can be a complex and difficult task. Competence to execute an advance health directive or appoint an attorney is ultimately a legal determination, and yet the legal profession may seek the opinion of a medical practitioner regarding an individual's decision making capacity. Matters that must be understood by a principal/patient vary across jurisdictions where a person may execute such an authority. In jurisdictions where a patient is entitled to appoint an enduring power of attorney, the relevant legislation does not specifically refer to the mental state of the patient, or their level of understanding, at the time of the appointment. However, the witness to the execution of the document in each case must certify that the appointer signed the instrument voluntarily in their presence, and that they appeared to understand the effect of the instrument.

The common law test of mental capacity was summarised by the High Court of Australia in *Gibbons v Wright* as follows: The mental capacity required by the law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument, and may be described as the capacity to understand the nature of that transaction when it is explained.[1]

Legislation in Australia and the United Kingdom includes one or more of the following conditions that must be satisfied for an advance health directive to be valid:

- the person making the directive was competent at the time that it was made
- the directive was made voluntarily and without inducement or compulsion
- the directive was based on appropriate information and understanding of the choices and consequences
- the directive was intended to apply to the circumstances that have arisen
- there have been no changes in the wishes expressed and the directive has not been revoked
- whether the person who made the directive is permanently or temporarily incapacitated
- there are reasonable grounds for believing that new circumstances exist which did not exist at the time the person made the directive.[2]

What is the interaction between powers of attorney and guardianship legislation?

In New South Wales, SA, Tasmania and Victoria, an adult can appoint an enduring guardian to make health care decisions.

A potential point of conflict is where a principal becomes impaired and, although the principal had previously executed a valid enduring power of attorney, an application is made by another person to have either a guardian or administrator appointed to the principal. Where legislation specifically addresses this issue, the general rule is that the donee of the power of attorney must defer to the guardian or administrator. The existence of an enduring power of attorney does not prevent the appointment of a guardian or administrator in relation to a mentally incapacitated person. In a number of jurisdictions, the power of attorney is revoked by the appointment of the guardian or administrator.[3]

Risk management strategies

Legislation in most states and territories makes provision for a person to either appoint an attorney or guardian to make medical decisions on the principal's behalf, or leave instructions for their medical treatment in the event of loss of mental capacity (advance health directives). In some states, there is considerable overlap between these roles.

The primary legislation dealing with powers of attorney and advance health directives are outlined in *Table 1*.[3] A GP who is asked for an opinion on a person's capacity to enter a transaction should be informed of the relevant standard that the law requires for that particular transaction.

Table 1. Primary legislation

ACT
Powers of Attorney Act 1956
Guardianship and Management of Property Act 1991
Medical Treatment Act 1994

NSW
Powers of Attorney Act 2003
Guardianship Act 1987
Protected Estates Act 1983

NT
Powers of Attorney Act 1980
Adult Guardianship Act 1988

QLD
Powers of Attorney Act 1998
Guardianship and Administration Act 2000

SA
Powers of Attorney and Agency Act 1984
Guardianship and Administration Act 1993
Consent to Medical Treatment and Palliative Care Act 1995

TAS
Powers of Attorney Act 2000
Guardianship and Administration Act 1995

VIC
Instruments Act 1958
Guardianship and Administration Act 1986
Medical Treatment Act 1988

WA
Property Law Act 1969
Guardianship and Administration Act 1990
Acts Amendment(Advance Health Care Planning) Bill (awaiting proclamation)

Conflict of interest: none.

References

1. *Gibbons v Wright (1954) 91 CLR 423 at 438.*
2. Medical treatment for the dying. Discussion paper. Issued by the Attorney General/Minister for Health for Western Australia, 23 May 2005.
3. Collier B, Coyne C, Sullivan K, editors. Mental capacity: powers of attorney and advance health directives. The Federation Press, Sydney, 2005.

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