



September 2012

## **Enduring power of attorney for personal care and welfare– A guide for social workers**

*Informed consent* is a fundamental requirement for the provision of health services (subject to some limited exceptions). *Informed consent* is about respecting a client's individual autonomy and protecting the client's right to self-determination.

The starting point is that health services can only be provided when the client has made an informed choice and given *informed consent*. However, there are certain situations where another person will be authorised to consent to the provision of health services on the client's behalf. For example, the law enables a person to appoint someone to make decisions about their personal care and welfare in the event that they become mentally incapable. This is called an ***Enduring Power of Attorney for Personal Care and Welfare***.

It is important to note that there are two types of Enduring Power of Attorney (EPOA): an EPOA for personal care and welfare (for a person who is appointed to make decisions about a person's care and welfare) and an EPOA for property (for a person who is appointed to make decisions about the management of a person's property). While the same person can be appointed to be both types of attorney, it is common for a person to appoint one person as attorney for personal care and welfare and another person as attorney for property.

Issues concerning *informed consent* and competence can be complex, and the purpose of this guideline is provide you with guidance on your obligations when providing care to someone who has an EPOA for personal care and welfare. Your employer/agency may also have specific requirements/guidance on EPOAs that you must be aware of and ensure that you comply with.

While this guideline is focussed on EPOAs for personal care and welfare, there is also a brief overview on EPOAs for property at the end of this guideline.

## **Enduring power of attorney for personal care and welfare – general information**

When a person is competent they may, with legal advice, appoint another person to make decisions about their personal care and welfare in the event that they become incompetent. The appointment is set out in a written legal document. This document may authorise the attorney to act generally in relation to the person's personal care and welfare, or it may authorise the attorney to act in relation to specific matters only. The attorney will not necessarily be the person's next of kin.<sup>1</sup>

It is important that you obtain a copy of the document appointing the attorney, and that you retain a copy of it on your file.

---

<sup>1</sup>Importantly, next of kin have no general legal right to make care and welfare decisions on their family member's behalf. Nevertheless, it is important to discuss decision with family/whanau where possible, as their views may be relevant to an assessment of the client's competence, prior wishes, and/or best interests.

There can only be one EPOA in relation to personal care and welfare for a person at any one time. The attorney may be required by the terms of the EPOA to consult with family members, or other specified persons (for example, the person's GP).

An EPOA for personal care and welfare is not operable until the person is "*mentally incapable*". A person is *mentally incapable* if he or she lacks the capacity to:

- *Make a decision about a matter relating to his or her personal care and welfare; or*
- *Understand the nature or to foresee the consequences of decisions about matters relating to his or her personal care and welfare; or*
- *Communicate decisions about matters relating to his or her personal care and welfare.*

Importantly, every person is presumed competent, until the contrary is shown. This means that if you have a client with an EPOA for care and welfare, you will need to assess the client's competence before you can rely on it. Remember: if a client is competent, but has an EPOA for care and welfare on the file, the EPOA is not operable. However, while the EPOA is not in operation, it is useful to include that person in discussions, subject to the client's consent.

If the person is mentally incapable, and has an EPOA for care and welfare, the attorney must be treated as if they have "*stepped into the shoes of the client*", and must be consulted as if they were the client. You must, however, still involve the client in the decision-making as much as possible. It is also useful to discuss with the attorney the types of decisions that the client may still be able to make without recourse to the attorney, and to obtain agreement on an ongoing care plan where this is appropriate. Whenever informed consent is sought (either from the client if competent, or from the attorney if the client is mentally incapable) notes of the informed consent procedure should be documented in the client's health record.

An attorney must not act in respect of a "*significant matter*" relating to the person's personal care and welfare unless a *relevant health practitioner*<sup>23</sup> has certified, or the Court has determined, that the person is *mentally incapable*. A *significant matter* means a matter that has, or is likely to have, a significant effect on the health, wellbeing, or enjoyment of life of the person (for example, a *permanent change in their residence, entering residential care, or undergoing a major medical procedure*).

The health practitioner who is certifying that the person is mentally incapable must complete a prescribed form, and you should ensure that a copy of this form (the *certificate of incapacity*) is retained on your file.

The attorney must always act in the person's best interests. Specific duties include:

---

<sup>2</sup> A social worker is not included within the definition of "*relevant health practitioner*".

<sup>3</sup> 2015: **A Registered Social Worker as a Health Practitioner:**

A registered social worker is a health practitioner through the Health and Disability Commissioner Act 1994 No 88 Section 2(1): **Authority** has the same meaning as in Section 5 of the Health Practitioners Competence Assurance Act 2003; and includes the Social Workers Registration Board established by Section 97 of the Social Workers Registration Act 2003 Sec 2(1)(b)(iii): **Health Practitioner** includes a registered social worker within the meaning of the Social Workers Registration Act 2003.

- *Encouraging the person's independence;*
- *Facilitating the person's integration into community as much as possible;*
- *Considering the person's financial situation when making decisions;*
- *Consulting the person, the EPOA for property, and any persons identified in the EPOA document.*

The Court may review any decision made by an attorney, and may revoke an EPOA if it is satisfied that the attorney is not acting in the person's interests.

There are a number of limits on the powers of an EPOA for care and welfare. Importantly, an attorney may not refuse consent to any standard medical treatment or procedure intended to save the person's life or prevent serious damage to the person's health.

### **What this means in practice**

Where a client is competent you must fully inform them of the nature of any proposed service and obtain the client's *informed consent* to participate in any service offered.

Where a client is assessed as being mentally incapable, and has an EPOA for care and welfare, you must:

- Communicate openly, honestly and effectively with both the client and the attorney;
- Involve the client in the decision-making as much as possible;
- Obtain a copy of the document appointing the attorney, and ensure that the proposed treatment falls within the powers of the EPOA. You should retain a copy of this document on your file;
- If the proposed service is a "*significant matter*" you must also ensure that a *relevant health practitioner* has certified, or the Court has determined, that the person is *mentally incapable*. You should retain a copy of this certificate on your file;
- Provide the attorney with sufficient information to enable the attorney to make an informed decision about proposed services, and give informed consent. You must provide honest and accurate answers to any questions raised by the attorney that relate to services, including questions about why you are recommending a particular course of action;
- Obtain the attorney's *informed consent* before providing services to the client. There will be some limited expectations to this requirement, for example, in an emergency;
- Document the informed consent procedure (i.e. information provided, options discussed, and details of the specific consent given) in the client's health record.

The attorney is also entitled to request access to *health information* that you hold about the client under section 22F of the Health Act 1956. You may only withhold this information if you believe, on *reasonable grounds*, that:

- *The client does not want the information to be disclosed to the attorney; or*
- *Disclosure would be contrary to the client's interests, or one of the withholding grounds in section 27-29 of the Privacy Act 1993 would apply if the request had been made by the client (you will find further information on this in the Privacy Commissioner's publication [On the Record](#))*

If you have any doubt about whether you should rely on the client's own instructions or, whether due to the client's incapacity, you should rely on the attorney's instructions, you should discuss this with your supervisor, line manager, and other members of the care team. In difficult situations, legal advice may be required, and consideration may be given to asking the Court to make a determination.

If you have concerns that an attorney is not acting in the client's best interests, you should discuss this with your supervisor, line manager, and other members of the care team. In difficult situations, legal advice may be required, and consideration may be given to asking the Court to give directions to the attorney, review a decision by the attorney, or revoke the EPOA.

### **Enduring power of attorney for property – a brief overview**

A person can also appoint an EPOA for property matters. In most cases, you will be dealing with an EPOA for care and welfare, rather than an EPOA for property. However, there may be occasions where you need to liaise with an EPOA for property – for example, if you need someone to authorise payments on a client's behalf.

There are a lot of similarities between an EPOA for personal care and welfare and an EPOA for property. For example:

- The person has to get legal advice before appointing an EPOA for property, and the appointment will be set out in a written legal document. The document may authorise the attorney to act generally in relation to the person's property matters, or it may authorise the attorney to act in relation to specific matters only;
- The EPOA for property must act in the person's best interests and encourage the person to develop competence to manage their own affairs; and
- As far as practicable, the EPOA for property must consult with the person about their decisions.

However, there are some key differences. For example:

- An EPOA for property can either come into effect while the person still has capacity or may only come into effect when the person is incapacitated. This will depend on how the person wants the EPOA for property to operate, and will be recorded in the document itself;
- If the EPOA only comes in effect when the person is incapacity, the attorney must not act until a relevant health practitioner has certified, or the Court has determined, that the person is mentally incapable (a copy of this document should be obtained and retained on the client's file);

- There may be more than one person appointed as an EPOA for property, and, if this is the case each attorney may be appointed with the same or different powers; and
- An EPOA for property has to keep a record of the financial transactions that they undertake on the person's behalf.

If someone has appointed an EPOA for property you should record this in the client's notes, along with the EPOAs contact details. If you have concerns about the way a person's property is being managed or about the decisions being made by an EPOA for property you should discuss this with your supervisor, line manager, and other members of the care team.