



## Doctors, elder abuse, and enduring powers of attorney

Frances Matthews

### Abstract

There is widespread ignorance among doctors and other professionals dealing with incapacitated patients, about the scope and nature of powers granted when an enduring power of attorney is donated. This article discusses some of the shortcomings in the legislation contained in Part IX of the Protection of Personal and Property Rights Act (1988), and the appropriate course of action for those who think that attorneys are misusing their powers and failing to act in the best interests of incapacitated patients.

In New Zealand, the Protection of Personal and Property Rights Act (1988), hereafter termed the PPPR Act, is used to protect vulnerable adults who are unable to make their own decisions about welfare and property matters. Such people lack the capacity to understand the nature, and to foresee the consequences, of decisions in respect of matters relating to personal care and welfare [s.5(a)]; and lack the capacity to communicate decisions in respect of those matters [s.5(b)]. They may wholly or partly lack the competence to manage...their own affairs in relation to...property [s.25(1)(b)]. The Act is administered by the Family Court.

There are two means of protecting people who may be suffering from reversible or irreversible conditions such as brain injury, dementia or intellectual handicap:

- (1) By means of court appointed welfare guardians and property managers for those who lack the capacity to make their own decisions.
- (2) By means of an attorney appointed by the donor while he or she has the capacity to make decisions.

This article discusses shortcomings in the legislation concerning the appointment and conduct of attorneys contained in Part IX of the PPPR Act, and suggests some steps that doctors can take when dealing with those who have been granted an enduring power of attorney by their patients. There is widespread ignorance about the scope and limitations of enduring powers of attorney, and about the appropriate course of action for those who believe that attorneys are misusing their powers.

### Who can donate an enduring power of attorney (EPA)?

Any competent adult can donate an enduring power of attorney (EPA). It may be done at the same time as making a will, and many lawyers encourage their clients to do so as part of sensible estate planning,<sup>1</sup> or it may be done in later life when worries about personal health and the possibility of dementia may be uppermost in a donor's mind.

An EPA is seen as a cheap and accessible way of planning for the future by nominating a person such as family member or close friend to make welfare decisions in the event that the donor becomes incapacitated; for example, by illness or accident (s.98). The same person (s.99), or another person/persons (s.97), or a trustee

corporation may also be given power of attorney in relation to property and financial matters. EPAs in relation to personal welfare only come into force when the donor becomes incapacitated. The power given may be of a very general nature, or may be very specific, depending on the wishes of the donor.

Powers in relation to property can be general or specific according to the wishes of the donor and may come into force at any time regardless of the donor's capacity, or may only come into force in the event of the donor's incapacity. The donor must use an appropriate form specifying their wishes, and the document must be signed and dated by both donor and attorney, and witnessed.

### **Who can be an attorney?**

The Act specifies categories of people who cannot act as attorneys because they would already have been deemed incompetent in some or all areas. An attorney must be not less than 20 years of age, must not be bankrupt, and must not be subject to a personal order or a property order. They must not be special or committed patients under the Mental Health Act 1969. In other words, the attorney must be an adult and must be competent to act for the donor. The enduring power of attorney ceases to have effect if the attorney falls into any of the above categories; dies; or has his or her powers revoked by the courts (s.105), or by the donor; or otherwise becomes incapable of acting (s.106).

There is no mechanism to ensure that an EPA is revoked if the attorney becomes incapable of acting (for whatever reason), including being a special or committed patient. The Act does not further define being 'otherwise incapable of acting'. Suffering an incapacitating mental or physical illness due to dementia, stroke, or serious injury may all qualify.

GPs may find that one of their patients has donated an enduring power of attorney to a spouse or child who then suffers from a physical or mental illness which renders them unable to make decisions on their own, or the donor's behalf. Alternatively GPs, and others, may be unaware of the existence of an EPA.

### **Rights and responsibilities of attorneys, property managers, and welfare guardians**

There are more checks and balances operating on those appointed by the courts than on attorneys, and welfare guardians' and property managers' duties are more closely defined. (see Table 1 and Table 2).

**Table 1 Responsibilities of welfare guardians, property managers and attorneys**

<b>Variable</b>	<b>Welfare guardian</b>	<b>Property manager</b>	<b>Attorney</b>
Consult person	Yes	Yes	No
Consult others	Yes	Yes	No
File statements	–	Yes	No
Finite time	Yes	Yes	No
Best interests of person?	Yes	Yes	Not specified

Property managers appointed by the courts have a duty to consult the person whose property they manage, and others who are interested in the welfare of the person (s.43), and must prepare and file statements with the court at regular intervals (s.45). Statements filed by individual managers may be reviewed by the Public Trustee or nominated accountants (s.46). Any person, with the court's permission, can inspect the statements that have been filed (s.47). In contrast, attorneys do not have to consult donors or others, and their actions are not subject to automatic scrutiny.

**Table 2. Limitations of powers of welfare guardians and attorneys**

<b>Decision</b>	<b>Welfare guardian</b>	<b>Attorney</b>
Marry, divorce	No	No
Adoption	No	No
Consent to standard treatment?	Yes	Yes
Consent to ECT?	No	No
Psychosurgery?	No	No
Experiments?	No	No
Refuse lifesaving treatment?	No	No

ECT=electroconvulsive therapy.

Welfare guardians must consult the person for whom they act, and other interested persons (such as family members), as far as is practicable. They must encourage the person to make their own decisions as far as possible, and must also consult with property managers. They cannot make decisions concerning entering into marriage, dissolution of marriage, or adoption of children of the person. They cannot refuse consent to standard lifesaving medical treatment, or treatment that prevents serious damage to the person's health. They cannot consent to electroconvulsive therapy (ECT), psychosurgery, or (in most circumstances) participation in medical experimentation (s.18).

In addition, welfare guardians cannot refuse treatment intended to be lifesaving. This may (in some circumstances) apply to cardiopulmonary resuscitation (CPR); however, many clinicians would view CPR as a futile treatment in elderly patients with serious and multiple medical problems, including cancers, and would advise against attempts at resuscitation. Welfare guardians must promote and protect the welfare and serve the best interests of the person. Their appointment is not indefinite (s.12), as an attorney's is.

Attorneys have the same limitations on their powers as a welfare guardian, but they are not specifically instructed to promote the welfare of the donor, or to consult with the donor, or any other person such as doctors, social workers, or other family members. If they do not act in the donor's best interests, their powers may be revoked by the Family Court (s.105), but someone has to draw the matter to the attention of the court. The court may, if asked by the donor, review an attorney's decisions (s.103).

Any other person (not further defined in the Act) can apply to the court for review of an attorney's decision. Such a person must satisfy the court that there is evidence that the attorney has made the decision while the donor is incapacitated; and if so, the court has discretion to grant permission for a review, depending on a number of

factors including the relationship between the applicant, the attorney and the donor, and the merits of the claim.<sup>2</sup>

In reality, attorneys have wide powers to act (without the obligation to consult others, or account for their actions—unless an order is issued by the Family Court requiring them to do so). This means that if an attorney misuses his or her powers when the donor is incapacitated, others must approach the Court on the donor's behalf. They may not do so because of ignorance of donors' and attorneys' rights and responsibilities, reluctance to interfere in what may be seen as a family matter, or fear of the cost.

## **Misuse of EPAs**

In the UK, when donors become incompetent to manage their own affairs, EPAs must be registered with the Public Guardianship Office (PGO).<sup>3</sup> In addition, certain categories of relations must be informed—including the spouse, parents, children (including adopted children), full and half brothers and sisters of the donor (and their children), and grandchildren of the donor. The PGO does not monitor the way an attorney acts, but it considers complaints and can decide whether the attorney should be removed, or if other arrangements should be made for the donor.

At present, EPAs in the UK deal with property only. It is estimated that about 10,000 new EPAs are registered each year and that 10–15% of EPAs are operated improperly or fraudulently despite the registration requirements.<sup>4</sup>

There is no way of knowing how many EPAs are granted in any year in New Zealand, or how many are misused. In 2001, the Law Commission<sup>1</sup> received evidence of misuse of powers of attorney, including a small study of 130 reported cases of elder abuse in the Auckland area over a 2-year period, of which 40 were attributable to misuse of an EPA.

Misuse of EPAs fell into two broad categories:

- (1) Financial impropriety such as embezzlement of donors' funds, sale of donors' property for their own benefit, and theft of donors' possessions.
- (2) Failure to provide appropriate care, such as failing to arrange admission to a nursing home in order to save money; and prematurely arranging institutionalisation when the donor could have continued to live in the community.<sup>1</sup>

It is impossible to know how widespread these practices are, but family doctors, geriatricians, and psychiatrists may know of instances where attorneys have not acted in the donor's best interests—for example by refusing assessment or medical treatment for the donor; or refusing services such as Meals on Wheels, Home Help, and various personal carers for the donor; or by withholding money for care, or spending it inappropriately.<sup>1</sup>

### **The Law Commission identified several problems regarding EPAs:**

- Lack of monitoring of the donor's capacity when the EPA is signed, and at the point when the EPA comes into force.
- No requirement for independent legal advice on the implications of EPAs, or on the rights of the competent donor to revoke EPAs.

- No requirement to file accounts and no independent monitoring of the acts of the attorney.
- The powers of the Family Court are largely ineffectual because they are reliant on someone else to take action on the donor's behalf if he or she has become incapacitated.
- Donors are reluctant to start court proceedings against family members.<sup>1</sup>

The Commission advised that (in some circumstances) there should be proof that the donor had received independent legal advice and that the way in which attorneys dealt with property should be monitored. Older donors and those in various institutions should be advised of their rights by a solicitor, and a certificate issued to this effect, and there should be certification by a medical practitioner when the donor becomes incompetent. The Commission also advised the appointment of a Commissioner for the Aged to act on behalf of the elderly.<sup>1</sup> None of these recommendations have yet become law. The Commission rejected the idea of registering EPAs on the grounds of both the cost of maintaining such a register, and for reasons of privacy.<sup>1</sup>

## **Doctors and EPAs**

Both hospital doctors and family doctors may have to deal with attorneys acting on behalf of incompetent donors.

Problems may arise due to:

### **Issues of validity:**

- The donor may have signed an EPA when already incompetent, due to advanced dementia, for example. Discussions of the levels of competence required are outside the scope of this<sup>5,6</sup> and will be the subject of a future paper.
- The attorney may only be authorised to act in specific circumstances and may be exceeding his or her powers by consenting to medical treatment, or refusing it. An attorney with power only to act in relation to property cannot make personal care and welfare decisions, but may be responsible for paying doctors' bills.
- The attorney may be suffering from a physical or mental illness, which may mean that he or she lacks insight into the donor's true conditions and needs, and which precludes his making decisions on behalf of others. An attorney with a problem with substance abuse or gambling addiction may be using the donor's funds inappropriately, and may inappropriately refuse admission to a nursing home in an attempt to retain control of finances.
- The attorney may falsely claim that the donor is incompetent and seek to act on their behalf inappropriately.

Doctors, especially family doctors, with relationships with both donor and attorney, may be aware of these circumstances, or other family members may confide their fears about the circumstances of an elderly relative during the course of a consultation. The donor may confide in the family doctor.

Doctors should be aware of the limits of decision making powers by attorneys in relation to patient welfare, especially if the attorney is proposing to act in a way that is not in the patient's best interests.

It is not sufficient to disapprove of the donor's choice of attorney: the courts uphold the autonomy of competent donors and will not revoke an EPA simply because others disapprove of the attorney, provided he/she is capable of performing the duties required.<sup>7</sup>

It is reasonable for doctors dealing with incompetent patients to ask to see a copy of the power of attorney, and check that the attorney has the power to act on behalf of the patient, that the EPA was signed at a time when the patient was competent to sign it, and that the patient intended the attorney to act in the areas of personal care and welfare. Those dealing with the elderly are aware of vast grey areas where no power of attorney exists but they consult with the patient's spouse or children on personal care issues, reasoning that such people will have the patient's best interests at heart.

The vast majority of attorneys and family members do have the patient's best interests at heart, but a few do not.

### **Failure to act in the donor's best interests:**

- The power of attorney may be a valid one, but the attorney makes decisions or takes actions which are not in the donor's best interests such as failing to seek prompt medical advice when the donor is ill, or refusing to allow the donor to be admitted to a nursing home, or failing to provide appropriate care and supervision. See Table 3.

**Table 3. 'Red Flags': Is the attorney acting in the donor's best interests?**

<b>1. Attorney does not ensure donor attends scheduled appointments</b>
<b>2. Attorney does not ensure donor fills repeat scripts</b>
<b>3. Recurrent attendances at ED/ clinic with falls/burns</b>
<b>4. Refuses admission to home carers/ District Nurse/Meals on Wheels</b>
<b>5. Refuses hospital or rest home admission</b>

Family doctors may be aware that something is wrong if attorneys do not ensure that donors keep scheduled appointments, or an elderly donor has many emergency room attendances for injuries. A series of attendances for falls or burns may give rise to suspicion that all is not well, either because the patient is not receiving sufficient care and supervision, or that the carer/ attorney is deliberately assaulting the patient. When challenged, attorneys may refuse help and try to intimidate doctors and nurses with statements like 'I've got power of attorney and I know what Dad wants/needs.'

Neighbours, friends, and relatives may become concerned about the care given to elderly people by those with EPAs—and may turn to medical staff, social workers, and charities such as Age Concern, for help.

Medical staff may be reluctant to intervene because of worries about breaching confidentiality if they disclose their suspicions. Medical staff, however, have a duty of care to their patients, and in some circumstances the duty of care overrides

considerations of privacy and confidentiality, particularly in situations where the patient is vulnerable and cannot act for him- or herself.

If a doctor thinks that a patient is in serious and imminent danger,<sup>8</sup> they can disclose their concerns to appropriate people. This may take the form of contact with hospital geriatricians, social workers, or (in extreme circumstances) the police. A GP, after receiving allegations from neighbours and relatives of an elderly person, may visit the patient's home, and find that their circumstances are less than ideal. It may be possible to ask for admission to hospital, or assessment in the community. On a few occasions, it may be clear that the attorney is misusing his or her powers—perhaps making attempts to block hospital admission or access to services. Doctors may then have to turn to the courts for help.

If it is not possible to obtain help from the local hospital, phone or write to the Family Court detailing your concerns and your relationship with the patient. Charities such as Age Concern, or a local Community Law Centre, may be able to help with legal advice. Appropriate forms for the appointment of a welfare guardian or property manager are available from the Family Court, or from their website.<sup>9</sup> The Medical Protection Society (MPS) will be able to advise on issues of disclosure, and it is a good idea to keep them informed of steps you plan to take.

Attorney's powers can be overridden by personal orders from the Family Court (s.100). The Court, a competent donor, or a welfare guardian, can revoke a power of attorney. If the person is incompetent, a welfare guardian (s.10) should, if possible, be appointed in the place of the attorney. Usually the Family Court will appoint counsel to enquire into the circumstances surrounding an application, and under normal circumstances this can take time. In an emergency, such as the need for hospital admission, interim orders can be made, with arrangements for review after a certain period of time.

Appointment of a welfare guardian after a patient has become incompetent can be a time-consuming process. The appointment of an attorney while the donor is still competent to do so is a quick and cheap option for people who want the reassurance that relatives or friends will make decisions for them when the time comes. The EPA, properly used, should act as a shelter for the elderly from the vicissitudes of life, not as a weapon in the hands of the unscrupulous attorney. Doctors, and others caring for incapacitated patients, should be aware of the possibility of misuse, and be prepared to take action on behalf of those who cannot act for themselves. Familiarity with some of the issues involved should ensure they are not deflected from their roles as advocates for their patients by the existence of an enduring power of attorney.

**Author information:** Frances G Matthews, GP member of the Elder Abuse and Neglect Panel, Age Concern (Otago), Bioethics Department, University of Otago, Dunedin

**Correspondence:** Dr Frances G Matthews, Bioethics Department, University of Otago, Union Street, PO Box 56, Dunedin. Fax: (03) 479 2582; email: [gwenllian28@xtra.co.nz](mailto:gwenllian28@xtra.co.nz)

### References:

1. Law Commission Report no. 71: Misuse of enduring powers of attorney. NZLCR71. Available online. URL: <http://www.lawcom.govt.nz/documents/publications/R71epa.pdf> Accessed September 2004.

2. Hansen and Ors v Baikie, Christchurch District Court, 28th Oct 1997, PPPR 28/97.
3. Enduring Power of Attorney Act 1985. Available online. URL: [http://www.legislation.govt.nz/browse\\_vw.asp?content-set=pal\\_statutes&clientid=3007164827&viewtype=contents](http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes&clientid=3007164827&viewtype=contents) Accessed September 2004.
4. Lush D. Misuse of Enduring Powers of Attorney. Cretney and Lush on Enduring Powers of Attorney. 5th edition. London: Jordans; 2001.
5. re EW [1993] 11 FRNZ. 118
6. Perkins C. Assessing Capacity. N Z Fam Pract. 2002;29:41-3.
7. re W [2000] 3WLR 45
8. Health Information Privacy Code 1994. Rule 11(2)(d). Available online. URL: <http://www.privacy.org.nz> Accessed September 2004.
9. Family Court of New Zealand. Guide to The Protection of Personal and Property Rights Act 1988. Available online. URL: <http://www.courts.govt.nz/family/pppr> Accessed September 2004.