



# Adults with Incapacity

Who decides?

Alan Barr, Head of Personal Tax Planning

0131 656 0103

[alan.barr@brodies.com](mailto:alan.barr@brodies.com)

# Learning objectives

- General principles of the legislation
- Is there a test for incapacity?
- The simple solution - powers of attorney & advance directives
- Guardianship orders ....
- Children
- Any questions?

# Who decides – capable adult?

- Every patient over 16 is presumed to have capacity unless the opposite can be clearly demonstrated
- Having capacity means being able to:-
  - Understand the information relevant to the decision
  - Weigh up relevant information, including pros & cons of the treatment options proposed
  - Evaluate the information to reach a decision
  - Retain the information (long enough to make an effective decision)
  - Communicate the decision (by any means)
- Every patient has a right to autonomy - an irrational choice does not mean a lack of capacity even if the outcome is death

# Who decides that an adult is incapable?

- The medical professional who wishes to make a decision on behalf of the incapacitated person decides who has capacity
- Assessment – 2 pronged test:-
  1. Does a person have an impairment of the mind or brain, or is there some sort of disturbance affecting the way their mind or brain works?
  2. If so, does that impairment mean that the person is unable to make the decision in question at the time it needs to be made?
- Record:-
  - Why the capacity is in doubt;
  - Details of assessment process
  - Findings
  - If a psychiatrist or psychologist or any other person was asked for a second opinion

# The legislation

## Adults with Incapacity (Scotland) Act 2000

- Aim to safeguard over 100,000 vulnerable adults living in Scotland
- General principles:-
  - Benefit to adult
  - Least restrictive option
  - Wishes of adult both past & present
  - Consultation with interested parties
  - Encourage skills and exercise of residual capacity



# Powers of Attorney

- Unique opportunity to plan ahead
- Planning ahead can extend autonomy and choice
- Consideration has to be given as to when it is best to approach the client's family regarding powers of attorney, wills and living wills
- May provide peace of mind



# Powers of Attorney

- Gives control
- Freedom of choice
- Requires legal capacity
- Deed can be tailored to their needs by a solicitor
- Must be drawn up while the patient still has legal capacity

# Welfare Powers of Attorney

- Unlike a continuing power of attorney which covers finances, a welfare power of attorney covers decisions over medical treatment and welfare
- A welfare power of attorney can only be used if the patient has lost capacity to make the decision themselves
- An attorney can take decisions on clinical treatment & interventions which normally only the patient can make
- Each treatment is a decision-specific test, the patient may be capable of making some decisions and not others
- The deed must be registered with the Office of the Public Guardian before it can be used

# Who decides – attorney appointed?

- The law in Scotland presumes competence
- An illness or condition does not necessarily mean that the person is unable to make decisions themselves
- Capacity must be assessed specifically in terms of their capacity to make a particular decision
  - Can the patient understand the purpose and effect of a course of treatment?
  - Do they understand the consequences of accepting or refusing treatment?
- If they can, the patient can make the decision as they have capacity at that time to make that decision.

# Who decides – attorney appointed?

- If the patient is unable to consent, consent should be sought from attorney when practical and reasonable to do so
- When an attorney/guardian is considering any action they must be justifiable. Any action/decision must:-
  - Benefit the patient;
  - Be the least restrictive option – could they regain capacity, if so can the decision wait until then?
  - Take the past and present wishes of the patient into consideration, beliefs and values etc;
  - Consult with relevant others involved with the patient; and
  - Encourage the patient to exercise whatever skills he or she has concerning their personal affairs.

# Who decides – attorney appointed?

- The attorney is unable to insist on treatment that the GP does not think is in the best interests of the patient
- If you have concerns about the attorney as they disagree with the GP you can request an ‘nominated medical practitioner’ from the mental welfare commission to give an independent opinion
- Alert the local authority

# Powers of Attorney

- GPs play an important role in the granting of such deeds
- Do you ask your patients if they have such documents and whether they are up to date?
- Can you help facilitate preparation of such documents?
- Would it be beneficial for you to have copies of these documents on file?

# Certifying a power of attorney (1)

- A GP may be asked to certify a power of attorney confirming that the patient:-
  - understands the nature and effect of the deed
  - can retain the information
  - can use or weigh up that information as part of the process of making the decision
  - can communicate the decision
- If the GP is unable to make this assessment they must consult with another person (not the person seeking to be appointed as attorney) or assessment
- The GP ought to meet with the patient alone to ensure that not only do they understand what they are doing but that they are not being pressurised to sign the deed

## Certifying a power of attorney (2)

- It is often helpful to ascertain if they have had the opportunity to read the deed before the appointment (a relative has not 'dragged' them along) and understand it
- If you have concerns it may be useful to consult with others involved in the patient's care
- If you have concerns alert the local authority adult support and protection team and the solicitor who drafted the application

# Living will

- Sets out an individual's wishes on medical treatment in possible future circumstances where they no longer can:-
  - communicate a decision;
  - have capacity to consent to treatment; or
  - make informed decisions about their medical treatment (includes dementia, learning disability or personality disorder)
- It includes a statement of your wishes as to what treatment should or should not be given in certain circumstances (only what currently have a choice over in NHS)
- Unable to ask for life to be ended or refuse basic care, warmth, hygiene measures etc

# Living will

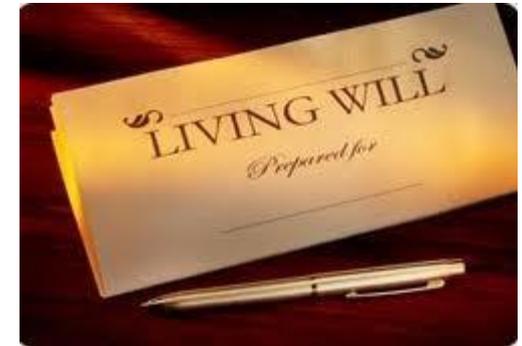
- Can aid the family when making difficult decisions
- A living will can be prepared as a separate document but it can also be incorporated as part of a welfare power of attorney
- Living wills should be reviewed regularly and those involved with care should have a copy of the most up to date deed

# Who decides?

- Check the date? Was a power of attorney granted since it was signed?
- Not legally binding (likely if challenged in Scotland would be respected)

## English case study

- In 2009, Ms Wooltorton was admitted to hospital
- She was thought to have drunk anti-freeze on up to 9 previous occasions
- On each of those occasions had accepted life saving treatment
- She suffered from an untreatable personality disorder
- Few days before last admission to hospital she drafted a living will



## Case study - England

- It was presented to medical staff in hospital while she was still conscious
- She refused treatment at the hospital
- As conscious it was irrelevant that she had granted an advance directive
- However, the inquest heard that the situation would have been the same had she been unconscious due to living will



# Advance directive

- Provision of the Mental Health (Care and Treatment) Scotland Act 2003
- If being treated for a mental disorder doctors have a duty to take into consideration how a patient would like to be treated if too unwell to make decisions for themselves
- Only relates to treatment a patient would like or not like to receive about their mental disorder
- Can be granted by a person under the age of 16 if they understand the nature and effect

# Advance directive

- To grant must:-
  - Have capacity
  - Must be in writing
  - Signed by the patient
  - Signed by prescribed person – Doctor, Nurse, MHO, OT, person employed in provision of a care service, solicitor
- All involved in medical care should have a copy and it should be reviewed from time to time
- NHS boards required to advise MWC when overridden
  - 47 x in 2014/15; and
  - 162 x since 2009

# Adults with Incapacity Act 2000 (as amended)

- Idea behind the Act, comically, was to remove some of the perceived rigidity and inflexibility of the appointment of a curator.
- Wished to create remedies:-
  - 1 Powers of Attorney
  - 2 Authority to access funds
  - 3 Care home to manage funds
  - 4 Intervention Order
  - 5 Financial + Welfare Guardian
- Intervention can only be made where positively required, using the least intervention

# What if a power of attorney is not an option?

- A Guardian is someone appointed by the court to look after the affairs of a patient who has lost capacity
- Where guardianship is required
  - 45% of all applications due to learning disability
  - 43% Dementia/Alzheimer's disease
  - 5% acquired brain injuries
  - 4% alcohol related brain disorder
  - 3% other mental illness
- Around 100,000 guardianship orders in Scotland (48 – 55 applications per 100,000 across Scotland)
- Number of applications on the rise

# Application for guardianship order

- Consider who is in a position to help the adult:-
  - Professionals, usually a solicitor or accountant (not welfare)
  - Elderly spouse/long term partner
  - Parents to an [adult] child
  - Adult children to a parent
  - Chief Social Work Officer (welfare only)
- Typically takes about 6 months
- Expensive and cumbersome
- Legal Aid available in some circumstances

# Process

- Draft application to Court which explains why the patient needs a guardian and why the person seeking to be appointed is suitable
- Obtain reports:-
  - Medical (GP and consultant Psychiatrist)
  - Mental Health Officer - will consider the appropriateness of order sought and suitability of proposed guardian
  - Financial suitability report
  - 30 day time limit
- Court hearing
  - Will decide who is appointed
  - What powers they have
  - Duration (typically 3 years)



# Who decides?

- Provided the patient is incapable of:-
  - Acting; or
  - Making decisions; or
  - Communicating decisions; or
  - Understanding decisions; or
  - Retaining the memory of decisions

The welfare guardian appointed by the court may make the decision.

# Young people

- Adult is 16 in Scotland, 18 in the rest of the UK
- Law is complex involving legislation, case law, common law principles and codes of practice
- The law on consent reflects that children are capable of forming their own opinions, expressing these and evaluating advantages and disadvantages of different courses of action.
- s2(4) Age of Legal Capacity (Scotland) Act 1991  
*“ A person under the age of 16 years shall have legal capacity to consent on his or her own behalf to any surgical, medical or dental procedure or treatment where, in the opinion of a qualified medical practitioner attending him, he is capable of understanding the nature and possible consequences of the procedure(s) or treatment”*

# Young people – the right to consent

- This is a matter of clinical judgement and the GP will require to consider:-
  - The age of the patient
  - Their maturity
  - The complexity of the treatment proposed
  - The likely outcome of the treatment
  - The risks associated with the treatment
- The child must be able to:-
  - Understand the advice provided/proposed treatment
  - Understand the potential consequences
  - Make an informed choice
- No lower age for competence

# Who decides – incompetent child?

- If the child is not capable of understanding the nature of the treatment the child's parent or legal guardian decides
- Where the parents are unable to agree the decision rests with the courts  
*Re C & F (Children) 2003* – parents disagreed over MMR vaccination. The court held it was in the child's best interests to vaccinate.
- If the doctor is concerned that the parents are not acting in the best interests of the child the court may also decide *Re A (Children) (conjoined twins: surgical separation) (2000)*
  - parents refused consent to separation
  - application was granted
  - one twin died and the other survived



# Competent child – consent to treatment?

- Doctors must assess whether *Gillick competent*
- American Academy of Paediatrics have said children as young as 7 can understand and agree to tests
- UN Convention on the Rights of the Child - doctors must explain to children in a way they can understand
- A child must consent to certain medical procedures (examination/treatment) before undertaken if they have capacity
- Law still remains unclear on right of a competent child to refuse medical treatment

# Competent child – refusal of treatment?

- Legislation not clear, s2(4) Age of Legal Capacity (Scotland) Act 1991 provides no absolute right to refuse treatment
- *“if the child has sufficient maturity should not matter if the course of action benefits them”*  
*Report on the Legal Capacity and Responsibility of Minors and Pupils (SLC 1987)*
- Parents have various legal responsibilities towards their children such as to:-
  - *“safeguard and promote the child’s health, development and welfare”*
  - *“act as the child’s legal representative”*  
*Children (Scotland) Act 1995*

# Competent child – refusal of treatment?

- It is thought that parents are unable to authorise treatment which a child has refused
- If a disagreement, courts will have to take a view
- When application is made the court has to consider the welfare of the child and whether making an order is better than no order being made at all, having taken into account the child's views
- There is a legal debate as to whether this is even appropriate if the child has legal competence?
- Yet to be determined by the courts in Scotland

## Case Study – Hannah Jones



- Hannah Jones, 13 was diagnosed with Leukaemia at the age of 4 and following chemotherapy cardiomyopathy
- In 2007 she refused a heart transplant and was advised that she was likely to die within 6 months
- Herefordshire Primary Care Trust dropped a high court case after a child protection officer spoke to Hannah
- She advised “I’m not a normal 13 year old...I am a deep thinker. I’ve had to be, with my illness... Its hard at 13, to know I’m going to die but I also know what’s best for me... if I was a few years older, no one would be questioning me at all. But no one realises that I have already had to grow up faster than anyone else.”
- After falling ill in 2009 she accepted a heart transplant.

# Who are we?

- Scotland's largest law firm
  - 92 partners, 625 staff (400 fee earners)
  - Access to leading lawyers and experience in other disciplines across the firm
  - Scotland's largest team of personal and family specialists within a leading full service law firm
  - Legal 500 and Chambers Ranking
  - Many individual accredited specialists
- Locations
  - Edinburgh
  - Glasgow
  - Aberdeen

# Learning objectives

- General principles of the legislation
- Is there a test for incapacity?
- The simple solution - powers of attorney & advance directives
- Guardianship orders - the good, the bad and the ugly....
- Children

**Any questions?**