relate

information for all

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This edition of Relate describes the various ways in which older people who may become unable to make decisions may put alternative arrangements in place.

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Older People and Decision Making

Introduction

All adults have the right to make decisions about their lives, their finances and their personal and health care. The vast majority of older people make these decisions without intervention from anyone else. A small number may have problems making such decisions or implementing them or communicating them. There may be many reasons for this. You may be physically unable to collect your pension. You may be in hospital for a time and not be able to look after property. You may become mentally incapacitated and be legally incapable of carrying out certain transactions. You may be unable to communicate as a result of a stroke or other trauma. If you become incapable of dealing with your affairs, for whatever reason, there are various legal arrangements you can make to have someone else do these things on your behalf.

The choice of legal arrangements depends on your precise circumstances. Some of the arrangements are very simple to make and have limited effect - for example, appointing an agent to collect your social welfare pension. Others are much more complex and require the help of legal and medical professionals – for example, executing an enduring power of attorney. It is advisable, and essential in some cases, to take legal advice before entering into the more complex arrangements.

All of these arrangements – with the exception of the Wards of Court procedure – must be made by you while you are mentally competent. Some are only effective while you remain mentally competent; some, notably the trust, continue even if you become mentally incompetent while others – specifically the enduring power of attorney – are designed for dealing with the situation which arises should you cease to be mentally capable. The Ward of Court procedure differs from all the others in that it may be imposed on you. Social welfare agency arrangements

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may also be imposed on you in certain circumstances. There are no arrangements you can make to provide for decisions on health care.

None of the available arrangements meets all of the requirements of older people who are unable to make decisions. A number of countries have adult guardianship systems which allow for the appointment of a guardian to an adult who is unable to make decisions and which provide for a supervisory body to ensure that guardians carry out their roles properly and that the interests of the adult are protected.

The Law Reform Commission (LRC) has published two consultation papers on these issues: Law and the Elderly was published in June 2003 and Vulnerable Adults and the Law: Capacity in May 2005. These are available at **www.lawreform.ie.** These reports examine the problems which arise and the solutions which have been adopted in other countries. The LRC is planning to issue a Report on Vulnerable Adults and the Law which will set out its final recommendations for changes in the law.

The legal arrangements which are described here do not apply exclusively to older people but the emphasis here is on how older people can use them and how they are affected by them.

Power of Attorney

A power of attorney is a document in which you (the donor) authorise another person (the donee or attorney) to act for you in certain matters - on your behalf and in your name - in accordance with the terms set out in the document. So, for example, you may give a power of attorney to someone to buy or sell property. This may be a very wide power or it may have extensive conditions attached. A power of attorney can be special (limited to a particular purpose, for example, the sale of your house in your absence) or general (entitling the attorney to do almost everything that you yourself could do, for example, to manage your business while you are abroad). A power of attorney must always be in writing.

There are two kinds of power of attorney - a general or common law power of attorney and an enduring power of attorney (EPA). A general power of attorney is automatically revoked if you become mentally incompetent, marry, become bankrupt or die. An EPA is one which contains a statement by you (the donor) that you intend the power to operate even if you become mentally incapable and which meets other legal requirements. In fact, the main advantage of the EPA is that it provides a means for you to organise your affairs in advance of and in spite of mental incapacity.

How to Create a Power of Attorney

A general power of attorney can be created when signed either by you or at your direction and in the presence of a witness.

The procedure for executing an EPA is complex and cannot be completed without the involvement of a solicitor and a doctor. As it involves the transfer of considerable powers from you to another person, there are a number of legal safeguards to protect you from abuses. The EPA can only come into effect when certain procedures have been gone through. The courts have a general supervisory role in the implementation of the power. If you want to execute an EPA you should go to your solicitor.

The document creating the power must be in a particular format and must include the following:

- a statement by a doctor that in his/her opinion you had the mental capacity at the time that the document was executed to understand the effect of creating the power
- a statement from you that you understood the effect of creating the power
- a statement from a solicitor that he/she is satisfied that you understood the effect of creating the power of attorney and that you were not acting under undue influence
- a statement from the attorney that he/she understands the duties of an attorney

Certain people must be notified of the making of an EPA, including family members.

The attorney

An EPA may be granted to individuals or trust corporations but may not be granted to the following people:

- people under the age of 18
- bankrupts

- people convicted of offences involving fraud or dishonesty
- people disqualified under the Companies Acts
- an individual or trust corporation who owns a nursing home in which you live or an employee or agent of the owner, unless that person is also your spouse, child or sibling.

If you appoint your spouse as attorney and you subsequently separate or divorce, the EPA is no longer valid.

Registration

The EPA can only come into force when it has been registered. In order to register an EPA, the attorney makes an application to the Registrar of Wards of Court (in the High Court) once there is reason to believe that you are or are becoming mentally incapable. Before making this application the attorney must notify you of his/her intention to do so. The attorney must have a medical certificate confirming that you are incapable of managing your affairs.

A notice of the attorney's application must be served on you and on a number of other people (any of the notice parties may object to the registration of the EPA).

The role of the court

The court (in practice, the Registrar of Wards of Court deals with many issues) has a supervisory role in respect of the EPA. Among other things, the court has power to give directions about the management and disposal of your property. The court may confirm the revocation of an EPA if satisfied that you were mentally competent to revoke it. The court can order cancellation of the power where satisfied that:

- you are mentally capable and likely to remain so
- the attorney is unsuitable
- fraud or undue pressure was used to induce you to create the power

What an EPA does

The EPA may give general authority to the attorney to do anything which the attorney might lawfully do or it may merely give authority to do specific acts on your behalf. So, you may give the attorney power to look after your financial affairs or to make personal care decisions on your behalf or both. If you authorise the attorney to make personal care decisions, these must be made in your best interests, must be in accordance with what you would have been likely to do and the attorney must consult family members and carers in making these decisions.

A personal care decision is a decision concerning one or more of the following:

- where and with whom you should live
- whom you should see and not see
- what training and rehabilitation you should get
- your diet and dress
- inspection of your personal papers
- housing, social welfare and other benefits

The list does not include health care decisions although the borderline between personal care and health care decisions is not always clear. However, it is clear that the attorney does not have the power to make a decision as to whether or not you should undergo a medical or surgical procedure – see below for further information on consent to medical treatment.

Ending an EPA

There are various circumstances in which an EPA ceases to have effect – for example, if the attorney fails to fulfil certain conditions.

Once the EPA has been registered you cannot revoke it unless the court approves the revocation - even if you are for the time being mentally capable.

Trusts

Property, including money assets, may be held in trust on behalf of another person or to achieve a particular purpose. A trust exists when a person (the trustee) holds the property of another (the settlor) for the benefit of named people. The beneficiaries may be the settlor or may be other people.

By creating a trust you can ensure that, should you subsequently become mentally incapable, your affairs will be managed in a particular manner. The trust property continues to be administered by the trustees for your benefit without the necessity to have you made a ward of court.

A trust is also a useful tool if you have a child with a disability and you want to ensure that he/she will be cared for if you become incapable and after your death.

Trusts are legally complex and have tax implications so you should take legal and tax advice. There are different kinds of trusts. Discretionary trusts are especially useful if you want to provide for an incapacitated child without affecting his/her entitlement to state benefits.

Agency Arrangements

If you appoint another person to represent you in certain dealings with third parties, you are making an agency arrangement. You are called the principal and the person you appoint is called the agent or appointed representative. An example of an agency arrangement is where you appoint a friend or family member as an agent to manage your financial affairs, pay bills, insure the house and carry out similar activities while you are abroad for a period. You may appoint a professional to do these things and pay for the service – this is not an agency arrangement but a contract for services.

If you have a physical disability, your bank may allow you to execute a 'third party mandate'. This is a form of agency and authorises your agent to perform certain functions, for example, to write cheques on your behalf.

You may only make an agency arrangement while you are mentally capable and the arrangement lasts only while you remain mentally competent – social welfare agency arrangements are different – see below. The arrangement does not have to be in writing unless the agent is required to sell property on your behalf. It is nevertheless advisable to put the arrangement in writing so that both you and the agent are clear on what is intended and on what powers the agent has.

Agency Arrangements for Social Welfare Payments

The Department of Social, Community and Family Affairs has the power under social welfare legislation to make payments to a third party acting on behalf of a social welfare recipient. The legal status of a social welfare agency relationship is different from the general agency relationship in that the social welfare agency may be put in place or may continue in operation if you become mentally incapable.

If an agent is appointed to collect the money, it is still your money and there is a legal obligation on the agent to use it on your behalf and for your benefit. However, there is no formal mechanism in place for ensuring that agents do in fact use the money on your behalf nor is there any requirement that the agent account for how the money was spent. The Department may end the agency arrangement if it has reason to believe that the money is not being used for your benefit but it is not clear how they become aware of this.

There are two different types of social welfare agency arrangements.

Type "1" Agency

If you are getting your pension in the form of a Book of Payable Orders which you cash at the post office or bank and you are physically unable to cash the order or you move into a nursing home, an agent may be appointed to collect the money for you. You must nominate the agent in writing. There are no specific restrictions on who the agent may be. The agent may be a person in charge of your nursing home. You may cancel or revoke this arrangement at any time and you may appoint another agent or change the method of payment.

You may appoint a temporary type 1 agent for a short period – usually not more than three weeks – if you are temporarily unable to collect the money.

A temporary type 1 agency may be created when you sign the back of the payable order. You nominate the person to whom the money is to be paid and that person signs the order in the presence of a post office employee.

If you get your payment by using your Social Services Card at a post office, an agent may be appointed only if you are suffering from a serious illness.

Type "2" Agency

A type 2 agency arises where a social welfare officer decides (usually on the application of family members

and medical practitioners) that you are incapable of acting and that an agent should be appointed. Before making such a decision, a social welfare officer usually calls to assess your circumstances and needs and medical certification of incapacity is needed. The agent nominated is often a family member or the matron of a nursing home or hospital.

A type 2 agency usually arises where there is some mental incapacity. The agent deals with all aspects of the social welfare payment.

In the case of a Ward of Court or an attorney appointed under an Enduring Power of Attorney (see below), the Department of Social, Community and Family Affairs makes payments directly to the Committee of the Ward or to the attorney by nominating the Committee or the attorney as agent for the social welfare recipient.

Type 2 agents have the same legal obligation to ensure that the money is used for your benefit. They are also obliged to deal with other aspects of your social welfare payment including notifying the department of changes to your means if you are on a means tested payment or informing them of changes in your dependants.

Wards of Court

The ward of court system is effectively the only means by which a substitute decision-maker can be imposed on an adult. The legislation dealing with wards of court dates from 1871 so some of the language used is archaic. In order to be made a ward of court, you must be of "unsound mind" and not be capable of managing your person or property. The system seems to be mainly used for people who have property or money and who cannot manage them but it does also provide for people who are incapable of making personal decisions.

Procedure

There are a number of different application procedures available including an emergency procedure. The usual procedure involves a person (called the petitioner) asking the High Court to hold an inquiry into whether you (called the respondent) are of unsound mind and capable of managing your person or property. Anyone may be the petitioner but it is usually a family member. The petitioner swears an affidavit which must be attested by a solicitor. The petition must include the opinion of two doctors – they do not have to be psychiatrists but they usually are. The President of the High Court then decides whether or not to conduct an inquiry. If an inquiry is ordered, you are examined by a doctor sent by the High Court. The petition must be served on you and you can object to the inquiry or demand that it be held before a jury. If you want to object, you must sign the objection notice and have this witnessed by a solicitor. If you object, there must be a hearing. The hearing is before the President of the High Court and there may be a jury if the judge so decides – you do not have a right to a jury.

If the court decides that you should be taken into wardship, it may appoint a Committee of the Person (who may be one or more people) to deal with your personal affairs and a Committee of the Estate to deal with your money, property and business interests. Usually one person is appointed to fill both roles. The legislation does not set out who may be the "Committee" but it does specifically exclude a person who is in charge of the nursing home where you live. (The word "Committee" in this context does not have its modern meaning. It means the person into whose care the ward is committed.)

Other procedures

There are other procedures for admitting a person to wardship but they are not widely used. Some may not be consistent with the European Convention on Human Rights. The emergency procedure can be used by contacting the Registrar of Wards of Court. There is no petition and no medical opinion required at this stage. The registrar arranges for a medical examination and this is then treated as the petition. The process then continues as described above.

Being a ward

If you are made a ward of court, you effectively lose your right to make decisions. The court has the right to make all decisions. The Committee is usually given the right to make certain decisions but is always subject to the supervision and direction of the court. Usually the Committee is given charge of your day to day care but cannot, for example, change where you

live without getting the approval of the court. You may not give consent to medical and surgical procedures – again, the court makes these decisions. The court applies the test of "best interests" to all decisions. It may take the views of the Committee and/or other family members into account but is not in any way bound by them.

You continue to own any money or property which you have. Your money is usually lodged in the courts and managed by the Courts Service. The court may arrange the sale of property if that becomes necessary. You are generally not considered to be capable of making a will but if you had made a will while you were legally capable, it remains valid.

You may get further information from:
Registrar of the Ward of Courts,
Four Courts,
Dublin 7.
Tel: (01) 872 5555
www.courts.ie

Proposals for Change

The Law Reform Commission has provisionally recommended that the ward of court system be abolished and replaced with an adult guardianship system. (When the Law Reform Commission issues Consultation Papers, its recommendations are provisional. It will make final recommendations in its Report on Vulnerable Adults and the Law which is expected to be published later this year.)

The system which the Commission has proposed would involve a Personal Guardian being appointed for adults who are unable to make decisions. There would be a Tribunal to decide whether or not the person was able to make decisions. The Commission has set out proposals for how assessments of a person's capacity would be carried out. Broadly, there would be a presumption that people have the capacity to make decisions and it would have to be shown that they lacked that capacity before any substitute decision making arrangements would be made. The system would not be an all or nothing system as the Ward of Court system is. Instead, it would aim to facilitate people to make any decisions they were capable of making.

People who were considered to be incapable of making decisions would become "protected adults" and a Personal Guardian would be appointed, The Personal Guardian would be entitled to make a range of decisions on behalf of the protected adult while, at the same time, encouraging the protected adult to exercise as much decision making function as possible. The system would be supervised by an independent Office of the Public Guardian. This office would have the power to make certain major decisions on behalf of the protected adult and would have an overall supervisory role over Personal Guardians. It would also have the supervisory role over Attorneys appointed under EPAs. Protected adults would have the right to appeal to a Tribunal against any substitute decisions.

The Commission also proposes that there would be a statutory general authority to act reasonably. This would mean that decisions that are reasonably made for the personal welfare or health of a person who is reasonably considered incapable of making a decision would be given statutory backing. It would cover the sort of everyday decisions that carers make all the time but for which they do not have statutory backing at present.

Consent to Medical Treatment

In general, medical and surgical procedures may not be carried out without the informed consent of the patient. There is no general legal definition of consent or informed consent. (There is in the case of psychiatric treatment - in the Mental Health Act 2001 but many of its provisions are not yet in effect). The law is not clear on exactly how much information a doctor must give a patient. In practice, this is mainly governed by medical ethics (which are not legally binding).

The consent does not have to be in any particular form. It does not have to be in writing but it is the practice to get written consent for surgical procedures. You may give a general consent – for example, you may tell your doctor to do what he/she considers best. You may give implied consent by not specifically ruling out certain procedures or just by turning up for the recommended procedure. Your implied consent may arise out of necessity – for example, if unexpected complications arise during an operation the doctor may have to do something to which you have not specifically consented.

It is clear that adults who are capable of making decisions have the right to refuse any medical or surgical treatment and to insist that such treatment be discontinued even if the inevitable consequence is severe pain or even death. If a doctor or other medical professional carries out a medical or surgical treatment without your consent, this may constitute the crime of assault (see Relate, June 2005). The medical professional could also be sued for negligence and/or trespass to the person.

The law is not at all clear on what should happen if you are mentally incapable of making a decision about treatment or you are unable to communicate a decision. If you are seriously ill and not in a position to give or withhold consent, the doctor may carry out what would be considered usual procedures arising from necessity. So, doctors are acting lawfully if they administer life saving treatment and you were not in a position to give or withhold consent. In general, doctors have the right to make decisions to discontinue treatment for medical reasons even if you want it continued.

The problems arise here when the situation is not an emergency and you are not capable of giving or withholding consent. It is common for doctors to ask family members to sign consent forms in these circumstances. There is no legal basis for this. Medical ethics (but not the law) require that doctors consult family members if you are unable to make or communicate decisions. However, while their views may be taken into account, they have no legal right to give or withhold consent.

The current medical ethics (*A Guide to Ethical Conduct and Behaviour*, Medical Council, 6th edition 2004 **www.medicalcouncil.ie**) provide that it is desirable for a doctor to consult next of kin if a patient is unable to communicate or understand. If there is a dispute between the doctor and the family about the appropriate treatment, a second medical opinion should be sought.

Next of kin are, in order, spouses, children, parents, siblings. "Partners" have no legal status and have no right to be consulted. In fact, they may experience difficulties in seeing patients if family members object – this is the case whether you are in a heterosexual or a homosexual relationship.

Who may give consent

In some countries it is possible to appoint someone else to make decisions, including decisions on healthcare, on your behalf if you are not capable of making them yourself. As already stated, the Enduring Power of Attorney system in Ireland allows for the appointment of a person to make general decisions but it specifically does not allow for the making of health care decisions by another person. So, while you may suggest to your doctor or hospital that the wishes of particular people be taken into account, you cannot give those people any legal right to make decisions about your health care nor can you ensure that the doctor/hospital will abide by their wishes. You may be able to decide your medical treatment in advance by making an advance care directive.

Children

The Non-Fatal Offences Against the Person Act, 1997 provides that people of 16 and over may give valid consent to medical, surgical and dental treatment. In general, parents are entitled to make decisions in respect of minors (people aged under 18). This means that there is a grey area in the case of people aged 16 - 18 who are incapable of making a decision. It may be that parents are entitled to make decisions for them.

Advance Care Directives

There is no legislation on Advance Care Directives in Ireland so a precise definition is difficult. In general, it is a statement about the kind and extent of medical or surgical treatment you want in the future should you be unable to make a specific decision at the relevant time. So, people make directives to the effect that they do not want to undergo general or specific medical and surgical procedures. Sometimes these statements are described as "living wills", "advance statements" "advance decisions" or "advance refusals". In some countries, there is legislation which provides for the recognition and enforcement of such statements and in some cases provides for the form in which they should be made.

The fact that there is no legislation in Ireland does not necessarily mean that they are not valid in Ireland but their status is not clear. There was a court case in which it was suggested that properly made advance directives would be valid and enforceable but this was not the issue in the case and so there was no ruling.

It does seem that an advance directive which is clear and specific may be regarded as giving or withholding consent to specific treatment when you were in a position to make an informed choice.

There is no doubt that an advance directive is not enforceable if it specifies doing something which is illegal. For example, an advance directive stating that you want to be given medication which will hasten your death would not be enforceable – see suicide and assisted suicide below. Withdrawal of treatment is not the same as positive action to end life. A directive which specifies the kind of treatment you want is unlikely to be enforceable especially if it conflicts with the doctor's clinical decision. A directive is unlikely to be considered valid if it relates to circumstances which clearly were not envisaged when it was drawn up.

Legislation was recently passed in the UK dealing with advance directives. The Mental Capacity Act 2005 uses the term "advance decision". It provides that advance decisions, made by mentally competent adults, to refuse specified treatments may be valid if specific conditions are met. More stringent conditions are required for advance decisions to refuse life sustaining treatments. Further information on the UK legislation is at:
www.dca.gov.uk/menincap/legis.htm.

In the UK, an attorney appointed under a Lasting Power of Attorney (similar to an Enduring Power of Attorney in Ireland) does have the power to make health care decisions on behalf of the person granting the power.

Suicide and Assisted Suicide

You are entitled to refuse medical treatment but this does not mean that you may take positive measures to end your own life or another person's life.

The Criminal Law (Suicide) Act, 1993 sets out the law in relation to suicide. Suicide itself or an attempt to commit suicide is not a crime. However, it is a criminal offence to help another person to take measures to end his/her life.

It is a criminal offence to aid, abet, encourage or procure the suicide of another person – the crime is usually referred to as assisted suicide. The maximum penalty for assisted suicide is 14 years imprisonment. If you help someone to commit suicide you may be charged with murder, manslaughter or assisted suicide depending on the exact circumstances. Such a charge could arise if you help another person to end his/her life even if the other person is terminally ill or wants to end his/her life. This applies to medical professionals in the same way as to other people.

Painkilling drugs which may also shorten life may be administered if the intention is to deal with pain and not to end life.

Entitlements for the Over Sixties

Explains clearly the various cash payments, benefits and other services available to people over age 60.

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