



Focus

The Protection of Personal and Property Rights Act

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As the population ages, the number of people with dementia or other cognitive difficulties increases. GPs should be aware of the available legal safeguards should patients lose the ability to make their own decisions.

The purpose of the Protection of Personal and Property Rights (PPPR) Act 1988 is "to provide for the protection and promotion of the personal and property rights of persons who are not fully able to manage their own affairs".

In theory at least, we hold that autonomy, or the ability to make one's own decisions, is a very important right which should not be removed lightly. The act aims to make the least restrictive intervention possible and to encourage the person to exercise and develop as much capacity as possible (Sec.8). For this act and similar acts overseas, there is a presumption of competence, ie, it has to be proven that the person lacks capacity rather than the other way round (Sec. 5, 24).

People requiring this act suffer from dementia or other neurological disorders, intellectual disability or mental illness to such a degree that it interferes with their decision-making capacity.

GPs may become involved when they have a patient who lacks capacity but needs to make a major personal decision such as consenting to treatment or moving into long term care.

GPs may also be requested to make an assessment of capacity when someone else is applying to the court under the act. This may be an issue around finances, personal welfare or the person's ability to sign an enduring power of attorney (EPOA). There are four ways to use the PPPR Act.

Personal Order

In a Personal Order the judge makes an order (under Section 10) that a person be managed in some way. The relevant orders for the older population are:

10(d) "that the person shall enter, attend at, or leave an institution specified in the order". If a person lacking competence refuses to go to a general hospital a judge can make the order to attend. This is a rare situation and the act is only used if the person cannot be persuaded to go voluntarily and strongly resists removal from home. Usually an

KEY POINTS

- The Protection of Personal and Property Rights (PPPR) Act 1988 provides for the protection and promotion of the personal and property rights of people not fully able to manage their own affairs
- Personal orders are specific and are tailored to the immediate need of the subject. They are the least restrictive because they deal with only one aspect of the person's life
- A welfare guardian is appointed to make decisions on behalf of a person who is unable to do so for him or her self
- A property manager may be appointed when the person wholly or partly lacks competence to manage his or her affairs in relation to property
- A person appointed as enduring power of attorney looks after the affairs of another should he or she become "mentally

incompetent older person (such as someone with delirium) is admitted and treated with the consent of their next of kin. This is currently acceptable practice.

A person may not be admitted to a psychiatric hospital under the PPPR Act. The Mental Health Act is used in this situation:

incapable". Appointing the EPOA while the person is competent saves expense and possibly a later court hearing

10(e) "*that a person be provided with living arrangements of a kind specified in the order*". This order can force a person with limited capacity to accept placement in a rest-home or private hospital for long term care; the most common situation being an elderly person with dementia having no insight into the dangers of remaining at home. The GP's role will be to provide a report on competency and the risks of remaining at home.

10(f) "*that the person be provided with medical advice or treatment of a kind specified in the order*". This applies to all age groups and is used to allow treatment for people who are unable to give informed consent, eg, a person needing neurosurgery for a brain tumour which is affecting cognitive function. The usual practice, however, is to get permission from the next of kin and only for disputed or particularly dangerous procedures do clinicians apply for an order. Sometimes consideration is given to using the act when a patient is refusing medical treatment or threatening to leave hospital against medical advice.

10 (g) "*an order that the person be provided with (educational) rehabilitative, therapeutic or other services of a kind specified in the order*". This order may allow certain kinds of treatment for which a person cannot give informed consent. Controversially, it has been used to allow physical restraint.

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In an urgent situation, which is often the case, the judge can make an ex-parte (interim) order. This means making a decision based on the written information provided without a court hearing and without seeing the person to whom the order is applied. These orders must be reviewed within six months.

Welfare guardian

A welfare guardian (Sec.12) is a person appointed to make decisions on behalf of a person who is unable to do so for him or her self. This applies only:

- a. if the person "wholly lacks the capacity to make or communicate decisions..." (Sec.12) or
- b. "the appointment of a welfare guardian is the only satisfactory way to ensure that appropriate decisions are made."

Mrs A, with severe dementia, cannot retain information for long enough to make any informed decisions. Mr B's responses after his CVA are so inconsistent that it is impossible to know what he means, although he may comprehend more than we can tell. Both would wholly lack capacity.

Because the welfare guardian totally takes over decision making this is seen as the most restrictive order possible. The guardian is obliged to make the person's welfare of paramount importance and to encourage the person to exercise his or her remaining decision-making powers. Only one person may have the role of welfare guardian.

Property manager (Part III)

For the appointment of a property manager, the subject must "lack wholly or partly the competence to manage his or her own affairs in relation to his or her property" (Sec. 25). Unlike the situation of a welfare guardian the person may still have a degree of capacity yet have a manager appointed. This reflects the complex nature of managing financial matters.

A person must not only be able to make decisions on a cognitive level, eg, "should I sell my house?" but also needs to be able to take practical actions such as ringing land agents and getting valuations. A person may have ability in the cognitive sphere but not the practical area or vice versa (Molloy 1999). To manage property a person needs both domains intact. Mrs C, with severe arthritis, who cannot walk to the bank or write cheques, is still able to make major decisions about her finances but needs someone to carry out her wishes. On the other hand Mrs D, with dementia but an appropriate social demeanour, can persuade bank tellers to let her have large amounts of cash which she then stashes around the house. Both could do with a property manager. More than one person or a trust company (such as Guardian or Public Trust) can be appointed as property manager. The manager is required to submit yearly accounts to the court.

Enduring power of attorney (Part IX)

A competent person (the donor) may decide to appoint a person (the attorney) to look after his or her affairs should he or she become "mentally incapable" of doing so (Sec. 94). If the donor then becomes wholly or partly incapacitated or unable to communicate decisions, the attorney will take over the running of the donor's affairs.

When making an EPOA the donor may be as broad or as specific as he or she wishes. A person could appoint an attorney solely to pay the bills or give wide power to make decisions about welfare, eg, where the person will live or whether to have surgery.

Anyone can inexpensively appoint an EPOA. The relevant paperwork is obtainable from major bookshops, though many prefer to go through their lawyer. It is an issue worth discussing with patients who are having cognitive problems or just becoming frailer. If they appoint someone while they are competent this saves a lot of expense and possibly a court hearing later on. As there is a presumption of competence under law there is no requirement for a medical assessment of capacity at the time the person is appointing the attorney. Section 98 (3) directs that the attorney should not act until the donor is mentally incapable. Again there is no requirement for an independent assessment of the donor's capability at this point.

Practical aspects

Anyone can make an application, though Section 7 lists relatives, medical practitioners and social workers as being people who might specifically apply. If the GP thinks a situation might require the PPPR Act, the easiest route is to contact a geriatric or psychogeriatric team (if available). The attached social workers are usually experienced in the use of the act. Relatives may choose to go through their family lawyer.

The necessary paperwork can be obtained directly from the Registrar of the Family or District Court. If it is a matter of urgency a separate ex-parte form has to be filled out.

The court usually requires a medical assessment of competency to go with the application. There should also be a comment on whether the incapacity is likely to be permanent or temporary.

Once the application is lodged, the court appoints a lawyer to represent the person "in respect of whom the application is made". The lawyer then meets the person, explains the application and evaluates the situation in order to determine whether this is the best solution to the current problem. The goal is to encourage the person to express his or her wishes and to make the least restrictive intervention possible. The lawyer, the applicant and the person under the application attend a pre-hearing conference and usually an agreement is arrived at or an order made.

It is helpful to comment in the medical assessment on the likelihood of the patient's understanding of the proceedings and/or their being distressed by them. The judge has the discretion to excuse the person from attending.

There is provision for the court to pay the costs of the solicitor, but the court is still entitled to recover the costs in some cases (Sec. 65 (5) and (8)).

All this may take up to three months or longer in some cases.

When to intervene

For the GP it may be difficult to decide when to intervene. In the older age group the most common scenario likely to require consideration of this act is the older person no longer able to cope alone but not wishing to accept home help or move to residential care. If there are serious concerns about a person's safety it becomes necessary to be more directive. As this is a major assault on the person's autonomy, all alternative strategies should be exhausted first.

If Mr E is unsafe using the stove, it can be switched off or removed and Meals on Wheels provided or a home helper arranged to prepare food. If he leaves the meals untouched on the doorstep and refuses to let the help in then the situation will have to be reassessed.

Mrs F, who wanders, may be safe enough provided she stays in her own neighbourhood and can find the way home. If she starts to get lost, is victimised or is in danger crossing the road, consideration has to be given to being more assertive.

The decision needs to be made in consultation with the family. Different families are willing to take different risks, depending on their own situations and their knowledge of what the older person is like.

Of course, not all families have the older person's welfare entirely at heart. They may prefer to keep the parent out of institutional care for as long as possible to save the assets. If the GP has concerns about this it is better to go ahead with an application and let the facts come out in the court.

Failure of guardian or manager

There are provisions in the act for the removal of a guardian, manager or EPOA who fails to perform (Sec.89).

The property manager son of bedridden 90-year-old Mrs G in a private hospital is withholding funds which could improve her quality of life. However, it is very difficult for Mrs G, already judged incapable, to complain. It needs someone else to become aware of the situation and take action.

The GP and nursing staff need to keep an eye out for this type of abuse. All orders must be reviewed after three years, but the court does not activate this and often the order lapses because no one thinks to renew it.

An incapacitated person

signs an EPOA

Sometimes elderly people lacking capacity sign EPOAs without realising what they are doing. Unscrupulous people may take advantage of this, particularly in regard to property matters. A classic example of this is of a woman with dementia who signed five powers of attorney presented by different members of her family.

The Law Commission in a discussion paper "tentatively" suggests (among other things) that a medical practitioner should assess capacity at the time a person signs an EPOA and that other interested family members be notified.

Assessment of capacity (competence)

This sometimes sounds a daunting and complicated task. There are, however, sensible ways to go about it and this will be the subject of a later paper.

References

1. The Protection of Personal and Property Rights Act 1988.
2. Molloy WM, Darzins P, Strang D. Capacity to Decide. New Grange Press, Canada: 1999.
3. Law Commission. Preliminary Paper 40, Misuse of Enduring Powers of Attorney, A discussion paper. Wellington, May 2000

