Advance directives and the National Health Act

David McQuoid-Mason

Advance directives are instructions given by patients regarding their future treatment should they become incompetent to consent to, or refuse, such treatment. Where a directive authorises a third person or proxy to give consent such person impliedly also has the authority to refuse consent.

David McQuoid-Mason is Professor of Law at the Centre for Socio-Legal Studies, University of KwaZulu-Natal and publishes and teaches in medical law.

Corresponding author: *D M McQuoid-Mason (mcquoidm@ukzn.ac.za)*

When applied to refusal of treatment, advance directives usually take the form of 'living wills' or enduring powers of attorney. While living wills represent the wishes of the patient, enduring powers of attorney appoint proxies to make decisions on behalf of the incompetent patient. In South Africa neither living wills nor enduring powers of attorney have been recognised by statute.[1] It has been suggested that living wills should be recognised at common law – provided that they reflect the current wishes of patients.[1] However, enduring powers of attorney cannot be recognised because at common law they become invalid when the patient becomes mentally incompetent.[1]

Nearly a decade ago the South African Law Commission made recommendations for the statutory recognition of both living wills and enduring powers of attorney but these have never been implemented by government.[2] The National Health Act[3] now introduces an informal method for the appointment of proxies to make health care decisions.[4]

National Health Act provisions regarding mandated consent by proxy

The National Health Act provides a mechanism whereby patients may mandate a person in writing to consent to a health service on their behalf when they are unable to give such consent. [3] This provision appears to overcome the Common law problem of enduring powers of attorney becoming invalid if a patient becomes mentally incompetent.[1] However, the question arises whether this only applies to temporary mental incapacity or whether it also applies to patients who become permanently mentally incompetent.

The National Health Act states: 'Subject to section 8, a health service may not be provided to a user without the user's informed consent, unless the user is unable to give informed consent and such consent is given by a person mandated by the user in writing to grant consent on his or her behalf'.[3]

Section 8 of the National Health Act states that if the informed consent 'is given by a person other than the user, such person must, if possible, consult the user before giving the required consent'.[5] The words 'if possible' indicate that the Act recognises that consultation may not be possible because the health user was mentally incompetent at the time the consent was required.

Section 8 of the National Health Act also provides that if users are unable to participate in a decision affecting their health and treatment, after the service they must be provided with full knowledge in terms of section 6 – unless it would be contrary to the patient's best interests.[6] This means that patients must be told their health status; the range of diagnostic procedures and treatment options; the benefits, risks, costs and consequences of such options; and their right to refuse health services together with an explanation of the implications, risks, and the obligations of such refusal.[7] There is no reference to 'if possible' in this section so it could be argued that there is an expectation that the patients will not be permanently incompetent and that the information must be provided on their recovery. However, if a patient does not recover mental capacity it would clearly be impossible to provide the information. In such circumstances, would the mandated consent continue or would one of the other persons mentioned in the National Health Act[8] be required to give consent?

Does the mandated consent by proxy apply to patients who become permanently mentally incompetent?

Where the patient was mentally competent at the time that he or she mandated the proxy (in writing) to consent to treatment on his or her behalf, the National Health Act is clear – the mandated proxy consent prevails. According to the Act the categories of persons mentioned as having precedence regarding the giving of consent (i.e. a spouse or partner, a parent, a grandparent, an adult child or a brother or sister of the user) are only required to give consent if 'no person is mandated or authorised to give such consent'.[8] This means that if a person has been mandated in an advance directive to give consent he or she will take precedence over anyone else. (An 'authorised' person is a person 'authorised to give such consent in terms of any law or court order' (e.g. a curator)).[9]

The written mandate to the proxy by the health service user continues to operate whether or not the health user is temporarily or permanently mentally incompetent. It is similar to an enduring power of attorney without the legal formalities (and costs) of the latter. No formalities are required – other than that the mandate be in writing. It would be prudent, however, to have the mandate dated and signed by the patient and two witnesses.

Who may mandate consent by proxy?

According to the Child Care Act[10] minors over the age of 14 years may consent to medical treatment and those over 18 years of age to operations. Therefore, health users requiring medical treatment may appoint proxies if they are 14 years old or more, and users aged 18 years or more may appoint proxies for operations. In terms of the Choice on Termination of Pregnancy Act[11] girls of any age may consent to a termination of pregnancy. Thus patients of any age undergoing a termination of pregnancy may appoint a proxy. However, in all these cases the patients must be mentally mature enough to understand the nature and effect of the proxy mandate as well the treatment or operation that they are about to undergo.

Proxy mandates may include directions regarding refusal of treatment. However, in the case of children under the age of 18 years directions regarding refusal of treatment may be subject to the Constitutional provisions regarding the 'best interests' of the child.[12]

Conclusion

The National Health Act provides a cheap and effective way for patients who may become mentally incompetent during (or as a result of) a health service, to appoint proxies to make decisions on their behalf. All that is required is that the mandate be in

writing and that the patient be legally and mentally competent at the time that he or she executes it. Such proxy mandates take precedence over the wishes of relatives or partners and are binding – whether the patient is temporarily or permanently unable to give consent – unless a court orders otherwise.

1. McQuoid-Mason DJ. The legal status of the 'living will'. *CME* 1993; **11:** 59-64.
2. South African Law Commission. *Euthanasia and the Artificial Preservation of Life.* Working Paper 71, Project 86. Pretoria: South African Law Commission, 1997.
3. National Health Act 61 of 2003.
4. Section 7(1)(a) of the National Health Act 61 of 2003.
5. Section 8(2)(a) of the National Health Act 61 of 2003.
6. Section 8(3) of the National Health Act 61 of 2003.
7. Section 6(1) of the National Health Act 61 of 2003.
8. Section 7(1)(b) of the National Health Act 61 of 2003.
9. Section 7(1)(a)(ii) of the National Health Act 61 of 2003.
10. Section 39(4) of the Child Care Act 74 of 1983.
11. Section 5(3) of the Choice on Termination of Pregnancy Act 92 of 1996.
12. Section 28(2) of the Constitution of the Republic of South Africa Act 108 of 1996.