

Lasting Power Of Attorney - Provision Contemplating Help To Die West And East (Indonesia) Perspective

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ABSTRACT: The enactment of legislation governing decision-making for incapacitated individuals serves a crucial purpose, primarily enabling individuals to proactively plan for future incapacity by appointing trusted agents to make decisions on their behalf. In the context of England and Wales, adults can achieve this through the utilization of a lasting power of attorney, as stipulated in the Mental Capacity Act 2005 (sections 9-14). Specifically, a health and care lasting power of attorney grants authority to an appointed agent to make day-to-day care decisions in situations where the individual is unable to do so. It is imperative for district nurses to obtain the consent of the appointed attorney before administering treatment to the donor. Furthermore, a district nurse should conduct a comprehensive review of the actions taken by the donor's attorney, involving consultation with the donor, the general practitioner (GP), and the attorney. Should conflicts regarding care persist, legal intervention by the courts may be necessary. Notably, life-sustaining or necessary therapies would continue in such instances. It is essential to emphasize that lasting health and care powers of attorney are not subject to illegality, encompassing situations where the donor expresses wishes for euthanasia or assisted dying. District nurses are required to obtain a copy of the health and care enduring power of attorney, respecting the authority of the appointed attorney to make decisions in cases where the donor lacks capacity. In the Eastern context, considerations of human rights, religion, ethics, and law collectively categorize euthanasia as a criminal act. Conversely, while Indonesia lacks specific regulations addressing euthanasia, various legal sources indicate that both seeking and performing euthanasia are deemed criminal activities.

Keywords: Lasting power attorney; mercy killing; provision to die; Indonesian legal opinion



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INTRODUCTION

Under the provisions of the Mental Capacity Act 2005, an individual, referred to as the donor, has the capacity to grant decision-making authority to another person, known as the attorney. The introduction of the lasting power of attorney within the Mental Capacity Act has broadened the scope of subjects for which donors may empower their attorneys to make decisions. Historically, attorneys were exclusively authorized to make decisions pertaining to property and financial matters. However, the incorporation of lasting power of attorney allows donors to extend this

authority to cover a wider range of topics. Agents appointed under a durable power of attorney can now be vested with the responsibility to manage not only the donor's property and financial affairs but also matters concerning the donor's health and safety. This expanded authority enables attorneys to make decisions that are crucial to the overall well-being of the principal, encompassing both their physical health and financial considerations.(Griffith, 2018a; Knowles, 2017a; Murrell & McCalla, 2016; Sheather, 2006a)

Similar to other advance care planning mechanisms, a lasting power of attorney offers the donor an ongoing influence in medical decision-making, even in situations where they have become incapacitated. However, the ethical complexity of determining the viability of sustaining a person's life becomes especially challenging for individuals who have lost mental capacity.(GOV.UK, 2017a; Griffith, 2018b; Knowles, 2017b)

Knowing About Last Power Of Attorney

Competent adults can designate someone else to make decisions on their behalf in case of incapacity by creating a lasting power of attorney. Notably, the Mental Capacity Act 2005 introduced the authority for decision-making regarding care and treatment for incapacitated adults in English and Welsh law, marking the first inclusion of such provisions since 1959 (Mental Capacity Act 2005, section 9).(GOV.UK, 2017b; Griffith, 2018b; Knowles, 2017b) The 2005 Act introduces two categories of lasting power of attorney (LPA) to address a range of situations:

To this end, the Act recognizes two types of LPAs: a "property and affairs LPA" for managing one's financial affairs and a "personal welfare LPA" for managing one's health and personal care.

Despite Parliament's intention for lasting powers of attorney (LPAs) to be the primary tool for individuals to plan for future incapacity, some people have been dissuaded from creating them due to their complexity and associated costs. In response, the Ministry of Justice has taken measures to address this issue. They have initiated an advertising campaign, introduced an online registration process, reduced fees to £82 per instrument, and emphasized that fees are subject to means testing, with potential reductions or waivers for those on benefits or with low incomes. Additionally, the Ministry of Justice, in collaboration with the Department of Health and Social Care, has established the National Mental Capacity Act Forum. This forum, chaired by Baroness Finlay of Llandaff, aims to enhance the implementation of the Mental Capacity Act 2005, specifically focusing on the utilization of LPAs.(GOV.UK, 2017b; Griffith, 2018b; Knowles, 2017b)

In the fiscal year 2017/18, there were approximately 770,995 applications for lasting powers of attorney (LPAs), and the Office of the Public Guardian maintained a registry containing about 3,142,284 instruments. It is noteworthy that the majority of these instruments primarily pertain to financial and economic matters, rather than medical and care-related concerns.

Capacity

Possessing decision-making capacity, commonly referred to as "capacity," is a crucial aspect not only within the realm of advance care planning and durable power of attorney but also in the broader context of medical treatment. When an individual is deemed to lack capacity, their preferences may be taken into consideration during the decision-making process, but ultimately,

someone else assumes the responsibility for making the final decision. In instances where there is a pre-existing decision to decline treatment, the absence of capacity may be regarded as a situation in which the individual maintains some discretion even in the absence of full mental capacity. However, ethical considerations, as exemplified in Wrigley (2007), must be carefully weighed in such decision-making scenarios. To ensure that individuals are afforded every opportunity to participate in the decision-making process, the presumption is that they possess capacity unless proven otherwise, as outlined in the guidelines established by the Department for Constitutional Affairs in 2007. Determination of decision-making incapacity aligns with the criteria specified in the Mental Capacity Act of 2005. If an individual is unable to understand the information relevant to the decision at hand, retain that information, use or weigh that information as part of the decision-making process, and communicate the decision through any available means, they may be considered to lack decision-making capacity.(Wrigley, 2007, 2015a)

This systematic approach closely aligns with the principles delineated in two influential court decisions, namely *Re C (Adult: Refusal of Medical Treatment)* in 1994 and *Re MB (Medical Treatment)* in 1997. The definition of decision-making skill in these contexts revolves around the processes of understanding and remembering information, as well as utilizing and weighing that information to reach a conclusion. It's crucial to recognize that an individual's decision-making capacity can vary, ranging from relatively straightforward choices (such as selecting attire) to more nuanced decisions (for instance, deciding on a form of medical treatment). Notably, capacity is specific to the nature of the decision, meaning that an individual may lack the cognitive ability to make a complex decision while retaining the capacity to make simpler ones. The foundational principle of the Mental Capacity Act of 2005 is built on the notion that an individual's capacity to make decisions should be assessed in relation to specific questions rather than being viewed as a general, overarching condition.(Nicholson et al., 2008a; Sheather, 2006b)

Donors maintain full autonomy in selecting their agent, and under the provisions of the 2005 Act, a donor has the flexibility to appoint more than one attorney, with the stipulation that all appointed attorneys must be adults. It is crucial to note that no individual attorney can be granted the authority to independently select a successor; this responsibility invariably remains with the donor. Various options are open to donors for their choice of attorneys, including family members, friends, caregivers, medical professionals, and legal practitioners. Furthermore, the lasting power of attorney (LPA) may delineate specifics regarding the compensation that the attorney is entitled to receive, particularly if they serve in the capacity of attorney for more than one client. This provision allows donors to establish and articulate clear expectations regarding remuneration for their chosen attorney, adding an additional layer of clarity to the arrangement.

Making Decisions For Those Who Lack Capacity

Individuals or groups tasked with decision-making for individuals lacking capacity are obligated to adhere to the guidelines delineated in the Mental Capacity Act of 2005 (Department for Constitutional Affairs, 2007). The following five principles encapsulate this legal framework: Initially, there is a presumption that everyone possesses the capability to make independent decisions until proven otherwise. The determination of incapacity should not be hastily concluded, as it necessitates the exploration of all reasonable efforts to assist the individual in question.

Furthermore, an individual who makes a suboptimal decision should not be permanently branded as indecisive, acknowledging the potential for fluctuating capacity. For individuals lacking legal capacity, any decision or action undertaken on their behalf must be rooted in considerations of their best interests. Additionally, prior to initiating any action or decision-making, careful contemplation is essential to assess whether comparable outcomes can be achieved through methods that are less restrictive to the individual's rights and freedom of action.(Dimond, 2008a; Griffith, 2015a)

The second statutory principle underscores the imperative of exerting every possible effort to provide individuals with the requisite information and resources to facilitate their decision-making. Decisions should only be made on behalf of an individual when they lack the mental capacity to do so. It is noteworthy that if the individual possesses an advanced decision to refuse treatment, executed after the creation of the lasting power of attorney, the attorney cannot authorize treatment that contradicts the provisions of the advanced decision. This circumstance typically arises when the individual granted power of attorney assumes the role of decision-maker (within the attorney's registered scope). In adherence to the Mental Capacity Act of 2005, the decision-making responsibility at this juncture rests with the person holding the lasting power of attorney, who is obligated to act in the best interests of the individual they represent. (Dimond, 2008b; Griffith, 2015b)

Healthcare providers would be prudent to acquaint themselves with the ethical complexities associated with discerning a patient's "best interests." This familiarity is crucial not only to enhance their own understanding but also to offer adequate support to those tasked with making such determinations.

Health And Care Lasting Power Of Attorney

Health and care lasting powers of attorney enable an individual to grant legal authority to one or more designated individuals to make decisions pertaining to their health and care in the event of their incapacity(Lawrence et al., 2023; Mebrahtu et al., 2023). The LPA document, serving as a legal instrument, must be appropriately executed and submitted to the Office of the Public Guardian for it to come into effect, as stipulated by the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, regulation 9.

In adherence to Section 57 of the Mental Capacity Act 2005, the appointment of the Public Guardian falls under the jurisdiction of the Lord Chancellor. The official establishment of the Public Guardian's Office took place in October 2007, coinciding with the implementation of the Mental Capacity Act. This office plays a crucial role in assisting individuals in planning for their future care in the event of mental capacity loss and safeguarding those who are unable to make their own decisions. Concerning lasting powers of attorney (LPAs), the Office of the Public Guardian:

- Registers lasting powers of attorney (LPA)
- Maintains a public register of LPAs and responds to requests to search the registers
- Investigates complaints, or allegations of abuse, made against attorneys acting under a registered power

Within the framework of the Mental Capacity Act 2005, section 9, the health and care decisions entrusted to the donor encompass a spectrum, including determining the donor's residence, overseeing day-to-day care, managing medical and dental treatment, and granting consent to medical examinations or treatments. The donor exercises ultimate discretion in selecting their attorney and delineating the extent of the attorney's authority. For instance, a parent may designate their daughter to make decisions regarding daily living arrangements and care in the event of their incapacitation, while preferring that medical decisions align with the donor's best interests and be guided by specialists. This exemplifies the donor's autonomy in tailoring the lasting power of attorney to align with their specific preferences and values.(Dow, 2008a)

There exists a prevailing negative perception among the general public regarding health and care durable powers of attorney. It is important to note that these documents are not obligated to encompass every conceivable option available to the attorney; rather, their focus is on outlining the specific choices that attorneys are restricted from making. In the initial sections of the lasting power of attorney (LPA) document, the donor grants the attorney comprehensive authority to make health and care decisions on their behalf in the event of the donor's incapacity. The donor retains the freedom to determine whether any of these rights should be revoked. An exception to this broad authority pertains to supportive care for terminally ill individuals. Specifically, if the LPA instrument lacks a provision authorizing the attorney to provide or refuse consent to life-sustaining care, the attorney is not empowered to make such decisions, as stipulated in section 11(8) of the Mental Capacity Act 2005. This delineation is found in Section 5 of the Health and Care Instrument in its current form.(Dow, 2008b)

In situations where a lasting power of attorney does not expressly exclude the authority to consent to medical assessments and treatments, district nurses are required to engage in consultation with the appointed attorney and secure their consent before initiating care for a patient. Donors are afforded the flexibility of stipulating whether their attorneys should make decisions collectively or independently. Through the provisions outlined in section 10(4) of the Mental Capacity Act 2005, donors utilizing a lasting power of attorney can delineate which decisions must be made jointly by their attorneys and which decisions can be made unilaterally. District nurses should be mindful of section 10(6) of the Mental Capacity Act of 2005, which deems lasting powers of attorney void if they stipulate joint decision-making but only one attorney possesses the capability to make a decision. This underscores the importance of aligning the terms of the lasting power of attorney with the legal requirements to ensure its validity and effectiveness.(Dow, 2008b)

Restrictions On The Use Of A Personal Welfare Power Of Attorney

Section 11 of the Mental Capacity Act 2005 delineates the parameters within which an attorney operates, particularly in the context of providing consent for treatment.(Dow, 2008b)

- Does not possess the authority to grant or deny consent for treatment when the donor is competent to make such decisions.
- Cannot override a legally valid and appropriate advance decision made by the donor refusing treatment, even if the attorney-in-fact wishes to provide consent for the treatment.

- In situations where the donor lacks capacity, the attorney is only permitted to consent to or employ restraint if they reasonably believe it is necessary to prevent harm to the donor. The use of restraint must be proportional to the likelihood and severity of potential harm in the circumstances outlined above.

Furthermore, an authorized representative empowered to grant or withhold consent for medical treatment does not have the authority to compel the donor to undergo a specific medical procedure. The responsibility for such decisions lies with the treating physician or other medical practitioner, who is required to exercise their clinical judgment in determining the appropriate course of action.

Provision Contemplating Help To Die - West Perspective

In the legal proceedings of *Public Guardian v DA and others* [2018], the Court of Protection heard test cases presented by the Public Guardian regarding the legality of lasting powers of attorney (LPAs). Notably, all LPAs in these cases contained language authorizing the attorneys to carry out euthanasia or assisted suicide if deemed necessary. The expressions varied across the LPAs, with some providing explicit directives, while others presented more suggestive language. These instrument-specific phrasings encompassed:

- In the scenario where the potential for a non-vegetative existence, characterized by a satisfactory quality of life, emerges, the directive is to terminate life.
- Should my health decline to a degree where I am incapable of experiencing life to its fullest, I explicitly direct my attorneys to undertake any necessary measures to ensure my demise.
- While assisted dying remains impermissible under current UK law, it is imperative for my Attorney to be aware of my expressed desire, stated at the time of drafting, that I retain the option to conclude my life on my own terms when the appropriate moment arrives. This may involve considering options outside the UK, where assisted dying is legally sanctioned.
- With the aim of concluding my life with grace and tranquility, I express a preference for active euthanasia if, at the juncture when my pain and suffering become unbearable with no prospect of improvement, it becomes a viable option.

The judiciary held that the authority conferred upon a Lasting Power of Attorney (LPA) is contingent upon the parameters delineated in the 2005 Act, encompassing the consideration of the donor's inclinations and compliance with any specified limitations or conditions in the instrument. Any directive or inclination of a donor that directs or expresses a desire for the attorney to facilitate the donor's demise was construed as an endorsement or solicitation for an unlawful act, rendering it void (*Miles v Public Guardian* [2015]). The ineffectuality extended to directives or preferences contingent upon prospective legal alterations, given the precise statutory provisions and guidelines governing legal modifications could not be anticipated. Inclusion of such clauses in LPAs would introduce legal uncertainty and confusion, a circumstance the court deemed impermissible. Consequently, instructions or preferences of this nature hold no legal consequence. (Nicholson et al., 2008b; Wrigley, 2015b)

Mercy Killing In East Perspective (Indonesian Legal Opinion)

Concerning active euthanasia, the legal framework in Indonesia is unequivocal, stipulating penalties of up to 12 years of imprisonment. However, apprehending individuals engaged in passive euthanasia proves to be a complex endeavor. Justifiable homicide remains a plausible defense. The practice under discussion is euthanasia, a contentious legal concept involving the intentional termination of a person's life. Legal perspectives on euthanasia encompass various forms of sanctioned terminations. Death, a topic often shrouded in trepidation, experiences a distinctive dynamic within the realms of medicine and healthcare. The contemporary medical paradigm has transformed death from an unforeseen occurrence to a predictable event with officially recognized dates of occurrence. (Pradjonggo, 2016)

This capability has been facilitated through the practice of euthanasia. Euthanasia, in essence, involves the deliberate termination of a person's life in a painless manner, with justification rooted in alleviating the individual's suffering. The classification of euthanasia encompasses distinctions such as "passive," "non-active," or "aggressive," contingent upon the degree of forcefulness applied in the process. (Andersen & Baumann, 2015; Foot, 2019; Garrard & Wilkinson, 2005)

Passive euthanasia may be employed by medical professionals or family members who seek the cessation of an individual's life. Such circumstances may arise when a family, grappling with financial constraints, loses hope in affording a loved one's medical care. In instances where the financial burden becomes insurmountable, hospitals may request a "forced discharge statement" from the patient's family. While the inevitability of death is acknowledged, the expectation is for a natural demise. The Oxford English Dictionary characterizes euthanasia as "a gentle and comfortable death, conducted primarily in circumstances of agonizing and incurable disease," with "mercy killing" serving as a colloquial term for this form of homicide. Dorland's Medical Dictionary delineates two interpretations of the term "euthanasia." Firstly, it refers to a swift and painless departure from life. Secondly, it encompasses euthanasia as the voluntary termination of an individual with an incurable and intensely painful illness. (Albert, 2012; "Concise Medical Dictionary," 2020)

It should be noted that informal juridical terms in positive criminal law in Indonesia there is only one form of Euthanasia, namely Euthanasia which is carried out at the request of the patient/victim himself (voluntary Euthanasia) as explicitly regulated in Article 344 of the Criminal Code. Article 344 of the Criminal Code explicitly states: "Anyone who takes the life of another person at the request of his person clearly stated with sincerity is punishable by a maximum imprisonment of twelve years". (Amiruddin, 2017a; Prihastuti, 2018a; Priyanto et al., 2013a; RAHMAN & SAKKA, 2017a)

Article 344 of the Criminal Code establishes that the perpetrator is legally responsible for the death of the victim, even in cases where the victim explicitly requests the act. Consequently, euthanasia is deemed unlawful according to Indonesia's positive legislation. The act of "terminating one's life" is not permissible under Indonesian law, even if explicitly sought by the individual. Despite the potential for certain circumstances to mitigate the prohibition, such conduct remains illegal and is subject to penalties for those involved. (Amiruddin, 2017b; Prihastuti, 2018b; Priyanto et al., 2013b; RAHMAN & SAKKA, 2017b)

Recent requests for medical intervention aimed at terminating a life, exemplified by cases such as Hasan Kesuma's plea for a fatal injection for his wife, Mrs. Agian, and Rudi Hartono's similar request for his wife, Siti Zuleha, necessitate judicial examination within the framework of the aforementioned legal principles. These instances could be categorized under the umbrella of non-voluntary euthanasia. However, according to the explicit provisions of Article 344 of the Criminal Code, this scenario does not meet the legal criteria for euthanasia.(Enggarsasi, 2005; Noor & Ratna, 2005a; Priyanto et al., 2013b)

The formal legal criterion for the recent requests for medical intervention aimed at ending a life, such as those exemplified by Hasan Kesuma and Rudi Hartono, may align with the definitions of ordinary murder as outlined in Article 338 of the Criminal Code or premeditated murder as outlined in Article 340 of the Criminal Code. According to Article 338, deliberately taking another person's life is deemed a threat and is punishable by a maximum of fifteen years in prison. Article 340, on the other hand, specifies that deliberately and prematurely taking another person's life constitutes premeditated murder and is subject to severe penalties, including the possibility of the death penalty, life imprisonment, or imprisonment for a specified duration of up to twenty years.(Amiruddin, 2017b; Prihastuti, 2018b; Priyanto et al., 2013b; RAHMAN & SAKKA, 2017b)

In addition to the aforementioned laws, Article 356(3) of the Criminal Code can be invoked to apprehend individuals involved in euthanasia. This article pertains to "Persecution carried out by providing substances that are detrimental to life and health to consume or drink." Furthermore, it is pertinent to note the relevance of Article 304 and Article 306 from Chapter XV of the Criminal Code in this context. Article 304 stipulates that intentionally placing or leaving someone in a state of misery, even if obligated by law or consent to provide life, care, or maintenance, is punishable by a maximum of two years and eight months in prison and/or a maximum fine of three hundred rupiahs, as outlined in the provisions of Article 306.(Noor & Ratna, 2005b; Priyanto et al., 2013b; RAHMAN & SAKKA, 2017b)

Meanwhile, Article 306(2) of the Criminal Code specifies that an act resulting in death is punishable by a maximum imprisonment of nine years. The preceding two sections delineate the criminalization of abandoning individuals requiring assistance under Indonesian positive law. Furthermore, the act of passive euthanasia, a prevalent practice in Indonesia, is similarly proscribed by the aforementioned recent legal provisions.(Noor & Ratna, 2005b; Priyanto et al., 2013b; RAHMAN & SAKKA, 2017b)

CONCLUSION

In situations where a patient is incapacitated to make decisions regarding their healthcare, the appointment of a health and care enduring power of attorney grants the designated attorney the authority to make decisions on behalf of the patient. Consequently, district nurses may need legal guidance to secure permission for medical interventions concerning the donor. If a district nurse suspects that the appointed attorney is not acting in the best interests of the donor, it is advisable to address concerns with the donor, the donor's primary care physician, and the attorney. Should a dispute over medical treatment arise, it may necessitate legal resolution, wherein life-sustaining

therapy or interventions crucial to preventing rapid deterioration may be continued. It is imperative to note that an attorney acting under a health and care power of attorney is not obligated to engage in any illegal activities, including requests related to euthanasia and medically assisted suicide. Given the absence of specific regulations governing euthanasia in Indonesia, certain legal perspectives assert that the pursuit or commission of euthanasia constitutes a criminal offense, aligning with human rights, religious, ethical, and legal considerations. District nurses, to comply with the law, must obtain a copy of the health and care enduring power of attorney, ensuring awareness and adherence to the attorney's decision-making authority when the donor lacks the capacity to make such decisions independently.

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