

STEP JOURNAL

Power surge

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Dr Alon Kaplan and Meytal Liberman introduce Israel's new continuous power of attorney for vulnerable clients

Key points

What is the issue? Israel's Legal Capacity and Guardianship Law was amended in 2016 to introduce the continuous power of attorney (CPA) into Israeli law.

What does it mean for me? The CPA can be used in situations where a person has impaired or reduced capacity and wishes to plan for the future.

What can I take away? A CPA should be considered when conducting estate planning for a client who is resident or holds assets in Israel.

In recent years, the paternalistic approach to people with disabilities in Israel has been replaced with a new, more inclusive approach. This seeks to recognise the existence of various types and degrees of disability, and the need to respect the individual's wishes to the furthest extent possible. The new approach is also intended to allow the individual to be involved in decisions. It has been brought into Israeli law by way of the 2016 amendment (the Amendment)¹ to the Legal Capacity and Guardianship Law (the Law),² creating new legal instruments to be utilised by people with disabilities, namely the continuous power of attorney (CPA).³

The CPA

Section 14(a) of Israel's Agency Law⁴ provides that agency terminates, inter alia, on the loss of capacity of the agent or the principal. Therefore, a person who wishes to leave instructions for another to execute, when that person's legal capacity is impaired, cannot do so by a regular power of attorney.

The proper instrument to achieve that is the CPA. This tool allows an appointer to authorise another (an agent) to act on their behalf in accordance with predetermined instructions in circumstances when the appointer's legal capacity is impaired.⁵

It should be noted that the CPA can be viewed as a parallel mechanism to the guardian, as the purpose of both is to create a function – the agent/guardian – to assist the appointer/client who encounters certain difficulties in their day-to-day life. However, each mechanism achieves this goal differently.

Eligibility requirements

The appointer and the agent must be eligible under the Law to appoint and be appointed respectively. The appointer must be a legally competent adult at the time of execution. The agent must also comply with several requirements in order to be appointed. These include, inter alia, that the agent must:

- also be a legally competent adult;
- not be the attorney executing the CPA;
- not be an agent in more than three CPAs;⁶
- not provide medical care or housing to the appointer for a fee; and
- if appointed with respect to the appointer's proprietary affairs, not be bankrupt.

Scope of the CPA

According to the Law, the CPA may be given with respect to the appointer's personal, medical or proprietary affairs. The general rule is that the agent is authorised to exercise any power conferred on them in accordance with the CPA as if it were exercised by the appointer. However, there are exemptions to this rule:

actions that the agent cannot be authorised to carry out: those that, by their nature, should be carried out personally, such as adoption and a conversion of religion;

actions that require the express authorisation of the appointer: such as donations, gifts, loans and any other financial transaction in the value of ILS100,000–500,000, and giving consent to a psychiatric treatment or hospitalisation; and

actions that require the authorisation of the court: those that may have significant implications on the appointer, such as financial transactions of a value higher than ILS500,000, sale or long-term lease of real property and withdrawal of funds from a pension plan.

Procedure and activation

The CPA is executed in an online form published by the Office of the Administrator General (AG)⁷ and structured in accordance with the Law and regulations thereof.⁸ The form can be filled in and executed only by a qualified attorney who is licensed for this purpose by the Israeli Ministry of Justice and the Israel Bar Association. Once the CPA is executed, it must be deposited with the AG, which then adds its confirmation to the CPA.

The CPA becomes effective when the appointer 'ceases to understand matters'. This event is determined in accordance with the conditions stipulated in the CPA by the appointer. The appointer is free to determine these conditions as they see fit, provided that the CPA is not activated on the decision of the agent solely.

By default, the CPA is activated on the issuance of a medical expert's opinion stating that the medical circumstances of the appointer require activation of the CPA. The agent must then provide a declaration to the AG stating that the conditions for activation have been fulfilled; the AG will then issue a confirmation that the CPA has been activated.

Despite the general rule that the CPA is activated when the appointer 'ceases to understand matters', the CPA can be activated with respect to the appointer's proprietary affairs only (and not with respect to the appointer's personal and medical affairs) on a predetermined date, regardless of the appointer's being unable to understand matters. Usually, the date is set for shortly after the execution of the CPA, while the appointer is still legally competent. In such a case, the relationship between the appointer and the agent in the time between the execution of the CPA and its activation by the AG is considered as a regular agency under the Agency Law.

It is important to note that the activation of the CPA does not derogate from the appointer's right to cancel it, and the Law states expressly that the coming into force of a CPA, by itself, does not negate a person's legal capacity. Nonetheless, the appointer may expressly state in the CPA that it will remain in force should they ask to cancel it in the future while legally incapacitated. In this case, the CPA will remain in force, though the appointer and the agent may apply to the court to cancel it.

Appointment of a guardian

Under the Law, the appointment of a guardian is seen as a last resort, since it limits a person's right to self-determination, freedom and other personal liberties. Therefore, s.33A of the Law guides the court on what factors should be considered when an application to appoint a guardian is made. It provides that the court shall not appoint a guardian to an adult unless all the following requirements have been met:

Without the appointment, the person's rights, interests or needs may be harmed.

A CPA relating to the matters in respect of which the appointment is requested has not been deposited with the AG.

After an examination of the alternatives, in the current circumstances, the court has concluded that the purpose of the appointment and the wellbeing of the person cannot

be obtained by other means that limit the person's rights, freedom and independence to a lesser degree.

The section also provides that, in circumstances where a person is unable to attend to their own affairs, but is able to make decisions with respect thereof, the court will not appoint a guardian, unless such appointment is restricted to the extent necessary. In the 2019 case of *AA et al v the Attorney General – the Ministry of Labor, Social Affairs and Social Services*,⁹ the court enforced the section and denied a son's application to appoint a guardian to his father because the father had previously signed a CPA.

Conclusion

The Amendment has radically changed Israel's approach towards people with disabilities, and its new instruments, namely the CPA, provide individuals with a means of fulfilling their wishes when they are no longer able to manage their affairs.

It is highly recommended that any practitioner or family office that provides services to individuals who are resident in Israel or hold assets in Israel consider using these tools in order to provide the client with a comprehensive estate planning service.

1. Legal Capacity and Guardianship Law (Amendment no. 18), 5776-2016, 2550 SH 798 (2016) (Isr)
2. Legal Capacity and Guardianship Law, 5722-1962, 16 SH 106 (1961-1962) (Isr)
3. Similar to an 'enduring' or 'durable' or 'lasting' power of attorney
4. Agency Law, 5725-1965, 19 SH 231 (1964-1965) (Isr)
5. The Law, Second 1 Chapter: Continuous Power of Attorney
6. Unless they are a relative of the appointer.
7. A draft version of the form is available at bit.ly/2FefMDb (Hebrew). The online formal form is available only to qualified and licensed attorneys.
8. At s.32M, and Legal Capacity and Guardianship Regulations (Continuous Power of Attorney, Preliminary Instructions to a Guardian, and a Document for the Expression of Will), 2017, KT 7801, 968, s.2 (Isr.)
9. 21463-01-19 Fam Ct (7 February 2019) (Isr)

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