

Arrangements for making decisions for other people

About this factsheet and who it is for

This factsheet explains how to make arrangements for other people to make decisions about your welfare and finances, should you ever be in a position where you are unable to make those decisions yourself.



The artwork on the front of this factsheet was done by an older artist for EAC's over 60s Art Awards.



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Introduction to the Mental Capacity Act

The Mental Capacity Act 2005, provides a legal framework and guidance for anyone who is helping a person who cannot make all their own decisions and who may therefore need some decisions to be made on their behalf. The Act also provides protection for people who lack the mental capacity to make their own decisions, some or all of the time. The Act says that anyone making decisions on behalf of another person must first consider whether that person may be able to make their own decision with help.

For example, they may need something explained to them in a straightforward way, or at a different time of day. Most people will be able to make some of their decisions themselves, so each decision should be considered individually.

Many people may not be able to manage all their financial affairs, but will know what they want to eat or whether or not they wish to go out for a walk. The Act says that when considering if someone can make a particular decision you will need to think about whether:

- They have a general understanding of what decision needs to be made?

- They have a general understanding of the consequences of this decision?
- They can weigh up this information and use it to make a decision?
- There is any way you could help them to make the decision for themselves?
- There is any way you can help them communicate their decision or their wishes and feelings?

The Act makes it clear that people have a right to make decisions which others may consider to be unwise. This means that your relative or friend may still be able to make their own decision, although you disagree with it.

The five principles of the Mental Capacity Act 2005

- Every adult has the right to make his or her own decisions and must be assumed to have capacity to make them unless it is proved otherwise.
- A person must be given all practicable help before anyone treats them as not being able to make their own decisions.
- Just because an individual makes what might be seen as an unwise decision, they should not be treated as lacking capacity to make that decision.
- Anything done or any decision made on behalf of a person who lacks

capacity must be done in their best interests.

- Anything done for or on behalf of a person who lacks capacity should be the least restrictive of their basic rights and freedoms.

If the person you are helping cannot make the particular decision themselves the Act says that you must make the decision in their 'best interests'. This may not always be what you think is best for them, because in deciding what is in their best interests the act says you must consider whether:

- They might be able to make the decision themselves at a later time;
- There is a way of involving them in making the decision, as far as this is practicable;
- You are taking into consideration their past and present wishes and feelings. You must take into account any written statement they may have made when they had mental capacity;
- You are taking into account their beliefs and values that would be likely to influence their decision if they still had mental capacity;
- Anything else the person would be likely to consider if they were able to do so.

The Act also states that decisions about life-sustaining treatment must not be motivated by a desire to bring about the person's death, and you must consider any other matters you believe may be relevant in the particular circumstances, because the above list is not intended to be exhaustive.

If you are caring for someone who cannot make all their own decisions, you will probably be able to work out what everyday decisions they can make for themselves, or with your help, and when you need to decide for them. When considering big decisions such as moving home, going into a care home or needing serious medical treatment, you should consider seeking professional help and advice, perhaps from the person's GP, hospital staff and/or social services.

Caring for someone who may be confused and forgetful or unable to communicate easily can be extremely difficult and stressful. The Act says that you will not be liable for an action you take in caring for the person, as long as you have first considered whether the person could make their own decision and have a 'reasonable belief' that they could not and that the action is necessary and in their 'best interests' (as best interests are explained above).

Arrangements for handling other people's affairs

When decisions are being made on behalf of someone else there are legal mechanisms to protect both the decision maker and the person for whom the decisions are being made. These can include Lasting Power of Attorney, Enduring Power of Attorney or applying to the Court of Protection. The Mental Capacity Act 2005 described above sets out who can make decisions, when and under what circumstances and, that they must be in the 'best interest's' of the person who lacks capacity.

Power of Attorney

A power of attorney is a legal document authorising one or more persons (the attorney(s)) to act on behalf of another. A Lasting Power of Attorney (LPA) or an Enduring Power of Attorney (EPA) allows the chosen attorney(s) to make decisions on behalf of a person if, at a time in the future, that person lacks capacity or can no longer make decisions themselves.

From 1st October 2007, 'Lasting Powers of Attorney' (LPA) replaced 'Enduring Powers of Attorney' (EPA) although, EPAs drawn up before October 2007 can still be used.

A person who has made an EPA or LPA knows that in the event of losing mental capacity to make some decisions, the person(s) they have chosen and appointed will have legal authority to help them and act on their behalf. It is sensible for all adults over 18 years of age to make an LPA. This avoids the need for an application to be made to the Court of Protection if the person does lose mental capacity.

Lasting Power of Attorney (LPA)

There are two types of LPA, The Property and Affairs LPA and The Personal Welfare LPA. The two areas are treated quite separately and are distinct from each other. The Property and Affairs LPA does not provide consent for the attorney to make decisions about the donor's personal welfare and a Personal Welfare LPA does not allow attorneys to make decisions about property and finance. To cover both areas the donor will need to make separate LPAs for each.

A person has to have mental capacity when drawing up a LPA so if someone is beginning to show signs of dementia it is important not to delay taking action for too long. Both the person making the power of attorney (the donor) and the attorney must be aged 18 or over and in

the case of the Property and Affairs LPA the attorney cannot be bankrupt when the LPA is signed.

Both types of LPA can carry restrictions as to exactly what the donor wishes or does not wish to happen should decisions be made on their behalf. Where more than one attorney is appointed the donor can choose whether they should act *jointly* or *jointly and severally*, as the phrases suggest 'jointly' means all attorneys must agree to the decisions and 'jointly and severally' means that decisions can be made either together or by a single attorney. The donor can apply restrictions for different types of decisions to be made in different ways.

The Property and Affairs LPA permits the attorney to manage the donor's finances and property. This can be whilst they are still able to make decisions but perhaps would find it difficult to do things for themselves because of a disability, illness or absence. For example collecting benefits or going to the bank.

Alternatively, the LPA can be restricted for use only if/when, at some time in the future, the donor lacks the capacity to make such decisions for themselves.

The Personal Welfare LPA permits the attorney to make decisions on behalf of the donor in relation to their personal

welfare. Unlike the Property and Affairs LPA, which can be set up to be used even if the person can still make their own decisions, a Personal Welfare LPA cannot be used unless the donor lacks the capacity to make their own decisions about their welfare.

Making an LPA is the only way to make plans for a time in the future when you may lack the capacity to make decisions for yourself. An LPA can only be used after it is registered with the Office of the Public Guardian (OPG).

Safeguards are built into LPAs to protect the donor, these are:

- the requirement that the LPA must be registered with the Office of the Public Guardian before use;
- the requirement to identify someone to provide certificate confirming, amongst other things, that the donor understands the purpose of an LPA and the scope of powers they are giving to their attorney(s);
- that certain persons chosen by the donor called 'named persons' are notified before registration of the LPA;
- the requirement for the signatures of the donor and attorney(s) to be witnessed;

When choosing an attorney, it is important that you are confident that

they know what you want and that you are comfortable that they will be making decisions on your behalf.

Making a Lasting Power of Attorney

Creating an LPA can be done by obtaining a special form from the Office of the Public Guardian (OPG) Customer Services or legal stationers. It can be downloaded from the internet at www.justice.gov.uk/forms/opg/lasting-power-of-attorney. Because it is such an important document and could potentially have a significant impact on the donor's future it may be sensible to seek some professional legal advice on its completion from a solicitor.

There are various people involved in making an LPA apart from the donor and attorney; these are all involved to act as safeguards to protect the donor. 'Named person(s)' chosen by the donor and specified in the LPA form are those to be notified when an application is made to register the LPA. They have the right to object to the registration of the LPA if they have concerns about it. If the donor does not wish to select a 'named person' then they will require two certificate providers.

The certificate provider must complete a Part B certificate in the LPA form to

confirm the donor fully understands the implications of making an LPA and is doing so of their own free will and a witness must sign to witnessing the signing of the LPA form by the donor and the attorney.

The certificate provider can be either someone who has known you personally for at least two years or someone who has the relevant skills and expertise to certify that you understand the LPA. The OPG lists suitable professionals on the form; when instructing a professional it is important to note that they are likely to charge for their services. There is also a list of those people who cannot be a certificate provider including family members, business partners or employees.

The LPA form from the OPG will come with comprehensive guidance notes to enable you to fully understand each section of the form and how it should be completed. The OPG also produces booklets explaining LPAs reference LPA102 'A guide for people who want to make a Personal Welfare Lasting Power of Attorney' and LPA103 'A guide for people who want to make a Property and Affairs Lasting Power of Attorney'

Using a Lasting Power of Attorney

Before you can use a Lasting Power of Attorney it must be registered with the Office of the Public Guardian. Until registration has been completed, the LPA does not give the attorney any legal powers to make decisions on behalf of or to act for the donor. The registration can take place whilst the donor still has the capacity to make decisions or at anytime by application from the attorney. The OPG charges a fee of £82 per document for registering the LPA. There are exemptions if you are in receipt of the following means-tested benefits and you have not been awarded damages, which were disregarded when determining your eligibility for the benefit:

- Income Support;
- Income-based Job-Seeker's Allowance;
- Guarantee Credit part of Pension Credit;
- A combination of Working Tax Credit and either Child Tax Credit, Disability Element or Severe Disability Element;
- Housing Benefit.

If you do not qualify for the above fee exemption, you may be eligible for a fee remission of 50% if your gross annual income (before tax) is below a set amount.

If you do not qualify for fee exemption or remission you can still apply for it to be waived on grounds of hardship. This would need to be by writing a letter explaining the circumstances in which paying the fee would cause hardship.

Once registered the LPA must be presented when required as authorisation to whomever the attorney is dealing with in making decisions or acting on the donor's behalf. Remember however that a Personal Welfare LPA can only be used once the donor lacks the capacity to make their own decisions.

Revoking a Lasting Power of Attorney

A registered LPA can be cancelled by the donor at any time, presuming that they still have the mental capacity to make that decision.

If a third party should become concerned that the attorney is not acting in the best interested of the donor, they can report this to the Office of the Public Guardian (OPG) who have the power to investigate and revoke the LPA if necessary.

Office of the Public Guardian

Telephone: 0300 456 0300

Enduring Power of Attorney (EPA)

Enduring Power of Attorney was replaced by Lasting Power of Attorney on 1st October 2007; however any EPA drawn up before that date is still valid and can be used.

The most significant differences between an EPA and the new LPA are that an EPA can be used without registration, until such time when the person no longer has capacity, at that time it has to be registered with the Office of the Public Guardian (OPG). An LPA can only be used once it's registered.

An EPA only enables the attorney to manage the donors financial and property affairs.

The EPA did not have the built in safeguards that the new LPA has when being drawn up but on registration the donor and at least three of their relatives must be given notice of the registration. An objection to the registration can be made from those given notice within 35 days of the application for registration. The OPG will then consider objections to the registration if made on one or more of the following grounds: -

- That the power purported to have been created by the instrument was

not valid as an enduring power of attorney

- That the power created by the instrument no longer subsists
- That the application is premature because the donor is not yet becoming mentally incapable
- That fraud or undue pressure was used to induce the donor to create the power
- That having regard to all the circumstances and in particular the attorney's relationship to or connection with the donor, the attorney is unsuitable to be the donor's attorney

Whilst the OPG does not monitor how attorneys use their powers, once the EPA is registered and in use, if a concern that it is not being used correctly and in the best interests of the donor is reported to the OPG they may investigate it and do have the power to see accounts or any other relevant information.

The Court of Protection

If no Lasting or Enduring Power of Attorney exists and it becomes necessary to handle someone else's affairs then to do so may mean involving the Court of Protection. The Court of Protection has the same powers as a High Court and can decide whether a person has capacity

to make their own decisions. It exists to provide protection for people who are incapable of handling their own affairs. The Court can make declarations, decisions or orders on financial or personal welfare matters affecting the person who lacks capacity and, in doing so, must apply the principles set out in the Mental Capacity Act. The Court of Protection serves England and Wales. Different bodies serve Scotland and Northern Ireland.

In most circumstances, the principles set out in the Mental Capacity Act, and in the Code of Practice can be followed to enable decisions to be made about the personal welfare of someone who lacks capacity. Where this is not possible, if particularly difficult decisions need to be made, disagreements need resolving or ongoing personal welfare decisions are needed an application to the Court of Protection may be necessary. In normal circumstances an application for an order from the Court would be required to handle someone's property and affairs of a financial nature in cases where no powers of attorney have been arranged.

Deputyship

A relative or some interested person may apply to the Court of Protection for a deputy to be appointed to manage the donor's property and affairs. A deputy is someone the court has appointed to make decisions on behalf of someone. Deputies must comply with a Code of Practice which defines how the Mental Capacity Act is applied in handling someone else's affairs. They are monitored and supervised by the OPG which might involve regular reporting, personal visits and/or other regular contact by court officials to ensure the person's affairs are being conducted in his or her best interests. If it is considered that a deputy is not fulfilling their duty the court can discharge them and seek the appointment of a new deputy.

Applying to the Court of Protection begins with seeking 'permission' to make an application. This would not normally be required for property and affairs applications but would be required for applications relating to the personal welfare for someone who lacks capacity. Different application forms for different circumstances are available from the court which must be accompanied by the full application fee unless exemption or remission applies

There is a minimum court fee of £400 on submitting the application and a deputy assessment fee of £100. There is also an annual supervision fee of £320 payable to the OPG.

Whilst you can complete the forms yourself, the majority of people will instruct a solicitor to deal with the application, meaning there will be an additional fee to be paid for this professional service. Further, when the person who lacks capacity dies, a charge is levied to wind up the finances along with an annual charge until the final deputy's account is approved; these costs are taken from the donor's estate.

Appointees

If someone's income only comprises of welfare benefits and a State Pension and no EPA or LPA exists then, rather than having to apply to the Court of Protection to become a deputy, application can be made to the Department of Work and Pensions to become an appointee to receive and disburse the income of the person because they lack the mental capacity to do so themselves.

The process is free and can happen relatively quickly. It will involve a DWP representative visiting the person concerned to ensure that they lack the capacity to deal with their own finances

and that the proposed appointee is suitable.

It is also possible to be an appointee for benefits administered by the local authority, such as Housing Benefit and Council Tax Reduction; if you wish to become an appointee for these benefits then you should contact the department responsible for benefits at your local council.

Independent Mental Capacity Advocates (IMCA)

Where people who lack capacity do not have family or friends who can be involved in decision making the Mental Capacity Act makes provision for what is called an Independent Mental Capacity Advocate (IMCA). An IMCA is an independent person who is qualified to represent the person's best interests when important decisions are being made about them. Local authorities and NHS Trusts are required to appoint an IMCA where decisions need to be made about serious medical treatment or moving the person to a hospital or care home.

Deprivation of Liberty Safeguards (DOLS)

A Deprivation of Liberty Safeguard (DOL) gives the legal authority to care homes and hospitals to effectively detain a person who is attempting to leave the facility. It should only apply in situations where the person concerned lacks the capacity to make their own decisions and all other attempts to persuade the person to stay have been unsuccessful.

If a person without capacity is being detained without a DOLS, this may be illegal. Contact your Social Services department if you think this is the case.

About FirstStop Advice

FirstStop is a free information and advice service designed to help older people decide how best to meet their needs for support, care and suitable housing. It is provided jointly by a growing number of national and local organisations and it is led by the charity, Elderly Accommodation Counsel (EAC).

About FirstStop Financial Advice

Working together, EAC and its partners in FirstStop Advice provide comprehensive information and guidance to help you afford the care, accommodation or services you need.

FirstStop's national Advisors are trained to advise on:

- What you may be entitled to in state benefits and financial help from your local authority;
- Whether you may be entitled to help with your care costs;
- Ways of making your income and capital go further;
- Services that are provided free by local and national voluntary organisations;
- Homesharing, co-housing and other mutual support networks.

A key FirstStop partner organisation is the *Society of Later Life Advisers (SOLLA)*.

SOLLA's members are regulated Financial

Advisers who specialise in providing financial advice to older people, they also adhere to the Society's Code of Best Practice.

If you decide, after speaking to us, that you would like advice from a SOLLA member, we can provide local details to you.

(Neither EAC or FirstStop has any financial interest in SOLLA or its member IFAs)

Contact us

- Visit us online: www.housingcare.org

The information contained in this factsheet is intended to be, and should be regarded as, a brief summary and is based on our understanding of present legislation, regulations and guidance. No responsibility can be accepted for action based on this information.

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