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A Guide to Lasting Powers of Attorney
and the Mental Capacity Act 2005



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Lasting Powers of Attorney and the Mental Capacity Act 2005?

The Mental Capacity Act (the Act) provides a legal framework for people who may not be able to make their own decisions because of an illness, a learning disability or mental problems.

The Act came into force in April 2007.

The Act repeals part of the Mental Health Act 1983 and the whole of the Enduring Power of Attorney Act 1985. Now the Act is operational it is no longer possible to make Enduring Powers of Attorney (EPAs).

There are transitional provisions so that Attorneys will still be able to act under EPAs created before the Act came into force.

There is a Code of Practice to tell people how to make sure they are following the Act's provisions. Some professional people like nurses, doctors, social workers or anyone who is getting paid for the job they do (e.g. Solicitors) have a duty to abide by the Code. Lay Attorneys will also be encouraged to read the Code and follow it.

The Act introduced several new things, including:

The Court of Protection (the Court)

Each regional Court is presided over by a judge, but it is not always necessary to go to Court. Many of the Court's decisions can be made by letter. The Court deals with everything to do with the Act. For example, it makes decisions about:

- Whether an individual should have an operation
- How an individual's money should be handled
- Anything else where someone needs to make a decision for an individual because the individual cannot decide for themselves

Lasting Powers of Attorney (LPAs)

These replaced EPAs. An Attorney's power under an LPA may extend not only to PROPERTY and MONEY but also to HEALTH and WELFARE decisions such as where to live or giving or refusing consent to medical treatment. In making any decision under an LPA an Attorney must follow the Act's provisions as contained in the Code of Practice concerning 'best interests' of the Donor.

It will be possible to have more than one LPA. Typically people may make one to deal with property and money and another to deal with health and welfare matters. An LPA dealing with property and money can be used both before and after the Donor loses mental capacity. Attorney's will only be able to make health and welfare decisions for Donors who lack the necessary capacity.

Deputies

Where you have not made an EPA or LPA then a Court can appoint someone to be your Deputy. The Court will specify what decisions a Deputy can and cannot make. The Deputy must act in your best interests. The Office of the Public Guardian will oversee what the Deputy does. If it is only necessary for one decision to be made the Court may take that decision without appointing a Deputy. This is called 'a single order of Court'.

Advance Decisions

These are sometimes known as Advance Directives or Living Wills. The Act codifies the common law position on them. An Advance Decision is when someone who has mental capacity decides that they do not want a particular type of treatment if they lack capacity in the future. A Doctor must respect that decision. If an Advance Decision says no to treatment which may keep you alive it must say this clearly and be signed by you. Someone else can sign for you but only if you agree and can see them sign. People have to think very carefully before making an Advance Decision. Individuals are free to make them if they want but must act free of duress and understand what the Advance Decision means. In the absence of an Advance Decision an Attorney under an LPA may be able to make decisions about treatment but must follow the 'best interests checklist' to decide what is in your best interests. Many people will be uncomfortable about making LPAs which give Attorneys the power to make health and welfare decisions for them.

The Office of the Public Guardian (OPG)

The OPG replaces the Public Guardianship Office. The OPG helps the Court by looking after the paperwork and applications regarding LPAs and Deputies. They also oversee the actions of Deputies and work with the police and social services whenever there is evidence of abuse.

The Independent Mental Capacity Advocate Service

This service helps people who have no family or friends and helps when important decisions have to be made about health or welfare matters for such individuals.