Martin House

Legal Advice for Families

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We have prepared this document with the help of Addleshaw Goddard LLP to answer some of the questions that we know families have regarding power of attorney and legal advice.

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1 What does mental capacity mean and how is it verified?

A person's mental capacity is their ability to make and communicate a specific decision at the time that the decision needs to be made. People who are over the age of eighteen are presumed to have mental capacity to make any decision which affects them, unless it is established that they are lacking mental capacity.

A lack of mental capacity occurs when something (for example, illness) impairs or disturbs someone's ability to make a certain decision. This impairment might be temporary or permanent. The impairment will prevent someone's decision making if he or she is unable to:

- understand the information relevant to the decision in question;
- retain that information;
- use or weigh up that information as part of the decision making process; or
- communicate their decision (by talking, sign language or any other means).

Information relating to the decision in question should be given to the person making the decision in a manner which is appropriate to their circumstances, and might, for example be given in simplified or pictorial form.

Whether or not a person has mental capacity may depend on the decision in question, and should be reassessed in relation to any new decision which that person is required to make.

If it is not certain whether a person lacks the mental capacity to make a specific decision, an application can be made to the Court of Protection for a declaration of mental capacity or incapacity in relation to that decision.

In respect of having the mental capacity to consent to medical treatment, young people aged sixteen and seventeen are considered to have mental capacity unless they have some disability which changes this presumption, just as those over the age of eighteen are. Those under sixteen can also be deemed capable of consenting to their own treatment if they are considered to have the intelligence, competence and understanding to appreciate what is involved in their treatment. If a young person refuses to consent to treatment which might lead to their death or severe permanent injury, however, their decision can be overruled by the Court of Protection.

2 What is a power of attorney?

A power of attorney (**POA**) is a document which allows a person to delegate the management of their affairs to someone else. The person who delegates the management of their affairs is called the 'donor'; the person who takes on the management of someone else's affairs is called the 'attorney'. POAs must be made whilst the donor has mental capacity

There are two different types of POA: ordinary POAs and lasting POAs (**LPAs**). Ordinary POAs will only be valid while the donor has mental capacity. LPAs are valid even once the donor has lost mental capacity.

There are two types of LPA: one for decisions relating to health and welfare, and one for decisions relating to property and financial affairs. When making a property and financial affairs LPA for decisions relating to property and financial affairs, the donor can decide whether they want their attorney to be able to make decisions on their behalf straight away or only when they lose mental capacity. If the donor is regularly in and out of hospital, or can find it difficult to leave their house, they may find having a property and financial affairs LPA in place very helpful as their attorney can help them with dealing with their affairs when they are not feeling well enough to do so themselves.

LPAs for decisions relating to health and welfare, on the other hand, can only be used when the donor has lost mental capacity. In these cases, the attorney can make decisions on the donor's behalf relating to the care and treatment they receive. If someone affected by illness is worried what might happen to them if their health deteriorates, making a health and welfare LPA may reassure them that someone they trust will be able to make decisions on their behalf.

3 My child is not yet eighteen can we apply for a power of attorney?

No, children under eighteen cannot make a POA. Until the age of eighteen, the person with parental responsibility for a child can make decisions on the child's behalf in respect of financial issues. A child's mother automatically has parental responsibility, as does their father if he is named on the birth certificate or was married to the child's mother when the child was born.

In England, fathers who were not named on the child's birth certificate or other adults taking a parental role in the child's life (such as step parents) may reach a parental responsibility agreement with the child's mother, which can be authorised to create parental responsibility. In other situations, an application can be made to Court for a parental responsibility order.

In relation to healthcare decisions, professionals reach decisions considering what is in the "best interests" of the child, taking into account the views of family members. This is a complex area of law and specific advice should be taken on a case by case basis.

4 My child is over eighteen and has mental capacity: Can they give me power of attorney? What is the process? How much does it cost? How long does it take?

Yes, anyone over eighteen with mental capacity can make an LPA.

As explained above, there are two types of LPA: one for decisions relating to health and welfare, and one for decisions relating to property and financial affairs. Having one does not mean that you are able to make decisions covered by the other, so you should make sure both are in place if this is your child's wish.

Your child can specify whether or not they want you to make decisions in respect of life-sustaining treatment, and can leave you as many or few instructions as they want. For decisions relating to property and financial affairs, your child can decide whether they would like you to be able to act on their behalf only once they lose mental capacity, or as soon as the LPA has been registered. For decisions relating to health and welfare, you can only act on your child's behalf once they lose mental capacity to make decisions themselves.

Any number of attorneys can be appointed, and your child can also appoint replacement attorneys to step in should something happen to their original attorneys. If they chose to appoint more than one attorney (for example, both parents), your child can decide whether they want their attorneys to be able to make decisions independently, or they would prefer for them to have to make all decisions together (i.e. unanimously). They can also specify some decisions which they would like their attorneys to make together, with all other decisions being able to be made independently.

Your child will also need someone to act as their 'certificate provider'. This is someone who can confirm that your child understands what they are doing, and that the LPA reflects your child's wishes. This can be either a professional (for example, a doctor or a lawyer), or someone who is over 18 and has known your child well for at least two years. This person cannot act as an attorney. Your child will also need an independent witness to witness their and their attorney's signatures.

You can find the forms to make LPAs on the gov.uk website, although care should be taken with their completion. A solicitor is likely to charge in the region of £500-£600 plus VAT for the completion of both types of LPA and acting as certificate provider, together with dealing with the registration process.

Once you and your child have filled out the forms, they must be registered for the LPA to come into effect. You will not be able to act as your child's attorney until the forms have been registered. It currently costs £82 per LPA to register, although some exemptions and reliefs are available for those with limited financial means.

5 My child is over eighteen and doesn't have mental capacity what are my options in relation to getting power of attorney?

Your child cannot sign an LPA if they do not have mental capacity. In this case, you would need to apply to the Court of Protection either to make a certain decision on your child's behalf, or to appoint you or someone else as their "deputy". If the Court decides to appoint you as your child's deputy, they will state the extent of your powers in their order.

It is highly unlikely that the Court will make an order for deputyship over health and care decisions (as the Court prefers to reserve judgement on these issues for itself), but much more likely that an order governing property and affairs will be granted.

The process is complex and you should consider asking a solicitor to assist.

6 Does lasting power of attorney rights continue if my child dies?

No, any LPA in place will expire on your child's death. On your child's death, the people they named as executors in their Will shall be able to manage their affairs on their behalf (for example, by winding up any bank accounts they had, and cancelling any bills in their name). If your child didn't leave a Will, their executors (then known as "administrators") are appointed according to a list of priority enshrined in law. Unless your child was married or had children of their own, parents would be the first choice as administrator.

7 Should my child have a Will?

If your child is under eighteen, they cannot make a valid Will. Instead, on their death, any possessions they owned will pass according to rules set out by law (which are called the laws of "intestacy"). Assuming your child is not married and has no children, parents will inherit equally. You may wish to encourage your child to write down what they want you to do with any valued possessions after their death.

If your child is over eighteen, their possessions will pass according to the laws of intestacy, unless your child is married, or makes a Will. If your child is over eighteen and has mental capacity, they should consider making a Will. This allows them to lay down any wishes they have in respect of funeral arrangements, who they would like to act as their executors, and what they would like to happen to their possessions after their death.

8 What is the difference between trustees and executors?

Executors are responsible for dealing with the practical issues which occur when someone dies. These include making funeral arrangements, collecting in any assets (such as money in bank accounts or savings accounts, as well as objects like cars) and distributing these assets according to the Will or the laws of intestacy, closing any accounts and cancelling any bills in their name.

Trustees are required where the Will or the laws of intestacy create a trust. In these cases, trustees are responsible for looking after the assets for the beneficiaries either in accordance with the terms of the Will or intestacy rules. The trustees have duties to ensure the assets are preserved for the beneficiaries, and have responsibility for managing the assets until this occurs (for example by ensuring any accounting or tax obligations are met).

9 Can you state wishes in a Will e.g. Not to use a certain care agency?

The provisions of a Will only take effect on death, so wishes regarding your child's care should not be contained in their Will. Any post-death wishes (for example, funeral directions) should be written into a Will.

If your child is over eighteen, has mental capacity and has specific wishes regarding their care, they should consider making a 'living Will' or "advance decision". In an advance decision, your child can state any treatments which they would not want to have. If this wish extends to situations where your child might die as a result of their refusal to have a certain treatment (referred to as life-sustaining treatment in these circumstances), they should state this in their advance decision. An advance decision must be made in writing and signed by your child. A witness must also sign if your child wishes to refuse life sustaining treatment.

Regardless of their age, your child may also wish to consider making an advance statement. This allows your child to write down their wishes in respect of their future care, and could include details such as where they would like to be cared for and whether they have religious beliefs which should be reflected in their care. Your child can include any practical or emotional preferences which would make them feel more comfortable whilst being cared for. An advance statement is not legally binding, but anyone who is caring for your child must take it into account. Your child should sign their advance statement to confirm that it reflects their wishes.

10 What else can I do to safeguard my child and families wishes in the event of my reduced capacity/death?

We would recommend that you ensure that your Will is properly (and professionally) drafted to ensure that your assets are protected and managed for the benefit of your family. This is to ensure that assets can be used for the benefit of your child whilst not giving them too much to manage themselves, not affecting any benefits which they receive, and not exposing the assets of your estate to a large charge to inheritance tax. The structure is likely to involve trust mechanisms and you should consult a competent professional to deal with this.

We would also recommend that you have LPAs in place for your own affairs in order that your assets can be properly managed in the event of your incapacity.

Practically, we would suggest that if your child has decided to write down their wishes, you may wish to ensure that a trusted person knows where these can be found in the event of something happening to you. If your child has mental capacity, you should ask them who they would like to know about their wishes in such a situation. Advance decisions and advance statements can be put with your child's medical notes to ensure that anyone involved in their care is aware of them.

If you have reason to believe you may not have the mental capacity to carry out your child's wishes, you could also write an advance statement of your own, and include how you would like your child to be looked after in this.

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