

# Mental Capacity - Powers of Attorney and Deputies

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# The Mental Capacity Act 2005



The underlying purpose of:

**The Mental Capacity Act** is to protect rights and freedoms of those with an impairment of the mind or brain and to avoid discrimination against those lacking mental capacity

To make a decision a person must be able to:

- Comprehend information relevant to decision
- Retain Information
- Weigh it in the balance to arrive at a choice
- Communicate the decision

A person can only lack mental capacity to make a particular decision if this is related to an impairment or functioning of the mind or brain

# What does it mean to ‘lack capacity’?



Section 2(1) of the Act states:

*‘.....a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself.....’*

*‘Material time’* will depend on the type and nature of the decision to be made.

- Decisions can be decisional – just in the moment
- Decisions can be decisional and performative – in the moment but application takes place outside of the discussion

**Retaining information** means being able to hold information in the mind for long enough to use it to make and effective decision. People who can only retain information for a short while must not automatically be assumed to lack mental capacity – it depends on what is necessary for the decision in question.

In *Heart of England NHS Foundation Trust v JB [2014] EWHC 342 (COP)* the Judge said

- *‘What is required is a broad, general understanding of the kind that is expected from the population at large. The person is not required to understand every last piece of information about her situation and her options. We should not ask more of people whose capacity is questioned than of those whose capacity is undoubted.’*

# What is an appointee?



**Appointeeship** - is governed by Regulation 33 of the Social Security (Claims & Payments) Regulations 1987 which state that a person may be appointed by the Secretary of State where:

*“a person is, or is alleged to be, entitled to benefit, whether or not a claim for benefit has been made by him or on his behalf; and that person is unable for the time being to act; and no receiver has been appointed by the Court of Protection with power to claim or, as the case may be, receive benefit on his behalf.”*

Appointeeship has no legal status outside of the Department for Work & Pensions. Some banks now recognise appointeeship and will operate bank accounts purely for the receipt and administration of state benefits up to (usually) around £3,000.

## **Responsibilities of an appointee**

As an appointee you're responsible for making and maintaining any benefit claims. You must:

- sign the benefit claim form
- tell the benefit office about any changes which affect how much the claimant gets
- spend the benefit (which is paid directly to you) in the claimant's best interests
- tell the benefit office if you stop being the appointee, for example the claimant can now manage their own affairs

# What is a Power of Attorney?



**Power of Attorney** - This is a deed by which one person (the 'donor') gives another person ('the attorney') the authority to act in relation to the donor's affairs. The person must have mental capacity to 'give' the attorney powers.

There are different types of Power of Attorney, but the main types are:

**Enduring Power of Attorney** - These became available in March 1986 under the *Enduring Powers of Attorney Act 1985*. Generally the power is 'live' from the moment it is executed. In other words, the attorney can act straight away, even where the donor is mentally capable of managing their affairs. These should be registered with the Office of the Public Guardian when a person is no longer capable of managing their financial affairs.

**Lasting Power of Attorney** - These replaced Enduring Power of Attorneys from October 2007 under the Mental Capacity Act. Attorneys have a duty to follow the principles of the Mental Capacity Act and act in the 'best interests' of the person at all times. These are usually registered with the Office of the Public Guardian at the time the application is completed. There are two types:

- Health and Welfare – this authorises the Attorney to make decisions in relation to a person's medical care, social care, where they live and their daily routine
- Properties and Affairs – this authorise the Attorney to make decisions in relation to a person's income, capital and property. Money must be kept in a separate account from the Attorney's money and gifts are not allowed except proportionate gifts on 'customary occasions such as birthdays, weddings, etc'

# Deputies and the Court of Protection



**Deputies** – are appointed by the Court of Protection (via the Office of the Public Guardian) on behalf of those people lacking mental capacity. Deputies can be appointed to manage either:

- Health and Welfare – this authorises the Deputy to make decisions in relation to a person’s medical care, social care, where they live and their daily routine.
- Properties and Affairs – this authorise the Deputy to make decisions in relation to a person’s income, capital and property. Money must be kept in a separate account from the Deputy’s money and gifts are not allowed except proportionate gifts on ‘customary occasions such as birthdays, weddings, etc’. Annual accounts are submitted to the Office of the Public Guardian for monitoring.

**The Court of Protection** is an office of the Supreme Court and its function is to administer the affairs of people who are mentally incapable of doing so for themselves. The Court deals with the appointment and removal of Deputies (formerly Receivers) as well as Lasting Power of Attorneys. The Court decides contentious and more serious issues on behalf of those lacking mental capacity to make certain decisions.

**The Officer of the Public Guardian** is the administrative arm of the Court of Protection and provides administrative support for the Court.

# When should an assessment of capacity be carried out?



## When to complete a Mental Capacity Assessment:

- Always start by assuming the person **does** have capacity to make the specific decision - assessment of capacity must be based on the person's ability to make a specific decision **at the time it needs to be made**, and not their ability to make decisions in general.
- Anyone saying a person lacks capacity should be able to show proof of that – to show, on the balance of probabilities (i.e. it is more likely than not) that the person lacks capacity to make a particular decision, at the time it needs to be made.
- It is important to carry out an assessment when a person's capacity is in doubt. Professional involvement might be needed if:
  - the decision that needs to be made is complicated or has serious consequences
  - an assessor concludes a person lacks capacity, and the person disagrees
  - family members, carers and/or professionals disagree about a person's capacity
  - there is a conflict of interest between the assessor and the person being assessed
  - the person being assessed is expressing different views to different people – they may be trying to please everyone or telling people what they think they want to hear, particularly in safeguarding matters
  - somebody has been accused of abusing a vulnerable adult who may lack capacity to make decisions that protect them
  - a person repeatedly makes decisions that put them at risk or could result in suffering or damage.

# When should a Best Interests decision be made?



## Making a Best Interest Decision:

Best Interest is not defined in the Mental Capacity Act. In fact the Code of Practice accompanying the Act states the following at para 5.13:

- *Because every case – and every decision – is different, the law can't set out all the factors that will need to be taken into account in working out someone's best interests.....It's important not to take shortcuts in working out best interests, and a proper and objective assessment must be carried out on every occasion. If the decision is urgent, there may not be time to examine all possible factors, but the decision must still be made in the best interests of the person who lacks capacity.*

The person making the decision on behalf of the person lacking mental capacity is referred to in the Mental Capacity Act as the 'decision-maker'. It is the decision-maker's responsibility to work out what would be in the best interests of the person who lacks capacity.

Anyone involved in making decisions on behalf of a person who lacks mental capacity, should make sure a record is kept of the process of working out the best interests of that person for each relevant decision, setting out:

- how the decision about the person's best interests was reached
- what the reasons for reaching the decision were
- who was consulted to help work out best interests, and
- what particular factors were taken into account.



# What decisions can a Best Interest Decision Maker make?



Decision Makers, including LPAs and Deputies can only make decisions when the person has lost mental capacity to make a particular decision.

Decision Makers cannot:

- Make personal decisions in relation to marriage/civil partnership, divorce, sexual relationships, adoption and voting.
- Make any financial gifts unless this is to a charity or to a family member, friend or acquaintance on a 'customary occasion', such as a birthday. Any gifts must be 'reasonable', within what the person can reasonably afford and take into account the person's past history of giving gifts.
- Make decisions that prevent a person doing something or going somewhere or restrain a person's freedom of movement.
- Make decisions to withhold life sustaining treatment.
- Proceed with any contentious litigation work carried out on behalf of the client, unless the case is to be taken to the Court of Protection.
- Use a person's funds to reimburse a third party for work carried out on their behalf.
- Make decisions that are for Adult Social Services or the NHS to make, in terms of how social care needs or treatment are provided.

# Mental Capacity and safeguarding?



The Care and Support Statutory Guidance states the following at paragraph 14.15

- *Making safeguarding personal means it should be person-led and outcome-focused. It engages the person in a conversation about how best to respond to their safeguarding situation in a way that enhances involvement, choice and control as well as improving quality of life, wellbeing and safety.*

Mental capacity is a frequent factor that must be considered as part of safeguarding, particularly where it appears an adult has capacity for making specific decisions that nevertheless places them at risk of being abused or neglected. The Mental Capacity Act created the criminal offences of ill-treatment and wilful neglect in respect of those lacking the mental capacity to make decisions.

Safeguarding is always a balance between protecting the person, understanding what they want to happen, appraising risk as well as being proportionate and reasonable. In *Local Authority X v MM and Anor (No 1) (2007)* Judge Munby said:

*"....all life involves risk, and the young, the elderly and the vulnerable, are exposed to additional risks and to risks they are less well equipped than others to cope with. But just as wise parents resist the temptation to keep their children metaphorically wrapped up in cotton wool, so too we must avoid the temptation always to put the physical health and safety of the elderly and the vulnerable before everything else. Often it will be appropriate to do so, but not always. Physical health and safety can sometimes be bought at too high a price in happiness and emotional welfare. The emphasis must be on sensible risk appraisal, not striving to avoid all risk, whatever the price, but instead seeking a proper balance and being willing to tolerate manageable or acceptable risks as the price appropriately to be paid in order to achieve some other good in particular to achieve the vital good of the elderly or vulnerable person's happiness. What good is it making someone safer if it merely makes them miserable?"*

# Any questions

