

# MENTAL CAPACITY: YOUR CHOICES

**The statistics show that problems with mental capacity are something that none of us can afford to ignore, whether for ourselves or for those we care about.**



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Individuals sometimes lose mental capacity. This may be the result of a long-term degenerative process, or it may happen unexpectedly or suddenly, maybe as a result of an accident. This note gives a brief explanation of the possible action that can be taken in advance to smooth the financial and personal problems that would arise if this were ever to happen to you, or to a member of your family.

## THE CHOICES IN OUTLINE

Many people have heard of using lasting powers of attorney (LPAs) to approach this problem. There are two types of LPA: one relates to property and financial affairs; and the other relates to health, medical and personal welfare decisions. You can give both types of power, or just one – or, of course, neither.

LPAs are the keystone of most legal arrangements for dealing with mental incapacity but there are other possibilities you should know about before reaching a decision.

For **property and financial matters** the possibilities are:

- a property and financial affairs LPA;
- a deputy appointed by the Court of Protection; and
- an ordinary power of attorney.

There is also special provision for 'self-settlement' which enables those in the early stages of degenerative diseases such as Parkinson's and Alzheimer's to create a trust for their own benefit within a favoured tax regime. That option is not covered in this note. Please ask if you would like to know more.

For **health, medical and personal welfare decisions** the possibilities are:

- a health and personal welfare LPA;
- an advance decision to refuse treatment; and
- sometimes the Court of Protection will appoint a deputy.

The question for each of us is whether we think it is better, in our own particular circumstances, to set up a structure that would cope with the problems of loss of mental capacity, or whether we prefer to leave matters to play out in whatever way they do.



## ...AN LPA CAN ONLY BE SIGNED WHILE A PERSON STILL HAS THE NECESSARY MENTAL CAPACITY...

This is a very personal decision, and there is no one right answer. It remains true, however, that whether a person plans in advance or not, if they were to lose mental capacity then someone would have to step in to take certain decisions on their behalf.

This note can only explain very briefly some options and does not give enough information for you to make an informed decision. To be able to decide which are the right pathways for you, you will need to discuss the implications of the various possibilities in more detail with us.

### FINANCIAL AFFAIRS

Unless they have only very modest possessions, anyone who loses mental capacity will need either an attorney under

an LPA, or a 'deputy' appointed by the Court, to assist with their financial affairs. This is because an ordinary power of attorney will not cover the case where mental capacity is lost.

### An ordinary power of attorney

An ordinary power of attorney enables the chosen person, the attorney, to deal with the day-to-day running of affairs. Ordinary powers of attorney are simple to prepare and easy to sign, but are not a solution to the problems of loss of capacity because:

- they provide little ongoing protection to the person who gives the power; and
- they automatically cease to be valid if that person loses mental capacity.

An ordinary power of attorney can, however, be helpful for someone who is mentally capable but physically frail and is finding it tiring to deal with financial affairs.

### **A deputy appointed by the Court of Protection**

If there is no LPA then if there were capacity problems a member of the family, or someone else who is concerned, would need to apply to the Court of Protection for a deputy to be appointed.

This would avoid the expense and effort of making an LPA that might never be needed, but it is the Court that will decide who is to be the deputy (taking family circumstances etc into account). The day-to-day expense of running a deputyship is likely to be greater than that of an LPA, not least because there is some additional vetting/protection by the Court. Moreover, there will be delay and expense while the Court proceedings take place to appoint the deputy.

Denzil Lush, a retired judge of the Court of Protection, has spoken in the media recently saying that he believes a deputy appointed by the Court is better than an attorney under an LPA, and this has caused understandable confusion.

Sometimes there are indeed circumstances where a deputyship is more suitable than an LPA – for example where family members are likely to find it hard to reach agreement – but in the majority of cases the delay and expense of an application to the Court may bring few or no benefits. We can discuss this with you.

### **A property and financial affairs LPA**

An LPA can only be signed while a person still has the necessary mental capacity. It enables the attorney(s) to look after the affairs if that person were to have mental capacity difficulties. It is the person who gives the power who gets to make the choice of who would act on their behalf, and they can give guidance, or even impose requirements, as to how the attorney(s) can act.

### **The financial choices summarised**

**Do nothing for now** – no immediate cost, but if capacity problems arise a relatively expensive application would have to be made to the Court of Protection to appoint a deputy to manage financial affairs.

**Make an ordinary power of attorney** – slight cost now, but would cease to be effective if mental capacity were lost, so an

application to the Court for a deputy would be needed.

**Make a property and financial affairs LPA** – cost now for preparation, but the person making the power gets to choose who would look after their financial affairs, rather than the decision being made by the Court.

### **HEALTH, MEDICAL, PERSONAL WELFARE AND CARE DECISIONS**

#### **A health and personal welfare LPA**

Until the introduction of health and personal welfare LPAs there was no procedure that allowed a person formally to delegate to someone else the task of taking these decisions on their behalf if need be.

**Unlike an attorney under a financial LPA, a health and personal welfare attorney can only act on behalf of the person who gave the power at times when that person actually lacks capacity.**

An important difference from Advance Decisions (below) is that the attorney(s) can make positive decisions as well as refusals, and can make them flexibly in the light of the circumstances at the time. The attorney is, however, in a position of great trust and responsibility, particularly if the

scope of the power is extended to include decisions about life-sustaining treatment.

### **An Advance Decision**

An Advance Decision is a written statement that can make legally binding refusals of treatment. Any requests for treatment are not legally binding. The Advance Decision must comply with certain formalities, and the person making it must have the necessary mental capacity at the time they do so.

Advance Decisions can be particularly useful to people who are very clear in their own minds that there are certain life-prolonging treatments they would not want if illness made their quality of life too poor. It is vital that an Advance Decision is reviewed regularly, as treatment options change, and so may the maker's views on what they regard as an acceptable quality of life.

Some individuals may have a 'living will', made under the old rules. These should be reviewed as there are some concerns about the validity of certain 'living wills made before

October 2007. In any event, the passage of time means that an old living will may well no longer reflect the wishes of the person who made it.

### **The medical and personal welfare choices summarised**

**Do nothing for now** – if mental capacity were lost, the medical professionals would make decisions, taking account of any known wishes of the person concerned, their family and any friends etc who are closely involved.

**Make an Advance Decision** – effective immediately without the expense and delay involved in registering a health and personal welfare LPA, but relatively inflexible and only binding *refusals* of treatment can be made.

**Make a health and personal welfare LPA** – flexible, allowing the attorney to make positive choices as well as refusals, in the circumstances as they stand at the time. It is very important that the person giving the power can trust the attorney(s) absolutely.

### **Make both an Advance Decision and a health and personal welfare LPA** –

allocating some matters to one document and some to the other. For example it is possible to combine an Advance Decision concerning life-sustaining treatment with an LPA which does not extend to decisions about life-sustaining treatment.

The number of options available gives flexibility but can also make it hard to make choices. Most people find that, in discussion with us, it becomes relatively easy to know which choice, or combination of options, is right for them.

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