

What is a Health and Welfare Lasting Power of Attorney (LPA)?

A legal document where a person (the Donor) has given authority to you (the Attorney) to make decisions on their behalf about their health and welfare. They were introduced in October 2007 by the Mental Capacity Act 2005 (the MCA).

What is my role as Attorney?

This is a very important role. You may be able to make the same decisions about the Donor's health and welfare that the Donor could normally make. However, you can only act once the LPA has been registered with the Office of the Public Guardian (OPG).

You will not be able to make decisions until the Donor has lost the capacity to make those particular decisions for themselves.

What if someone else is appointed with me?

Your appointment will be either jointly (all Attorneys must agree and act together), jointly and severally (each Attorney can act alone or you can act together) or jointly in respect of some matters and jointly and severally in respect of others (the Donor will specify in the LPA which decisions must be taken together).

What are my duties as an Attorney?

You have a duty to act in accordance with the principles set out in the MCA, and in particular to act in the Donor's best interests. You also have a legal duty to comply with the guidance contained in the Code of Practice (the Code) accompanying the MCA. Your duties and obligations are set out in greater detail in the Code.

We strongly advise that you obtain a copy of the Code (available from HM Stationery Office) and read it carefully if you are acting as an Attorney. You may also view the code online at the government website (www.gov.uk and search for Mental Capacity Act Code of Practice).

Failure to comply with your duties can lead to a criminal conviction in certain circumstances.

When should I act?

The MCA states that every adult is assumed to have capacity to make a decision unless it is established otherwise. Please be aware that the MCA makes it clear that simply making an unwise decision is not sufficient to show a lack of capacity. As a health and welfare Attorney you can only act when the Donor is incapable of making the decision themselves.

You should only make a decision for the Donor if you reasonably believe they lack the mental capacity to decide themselves. However, you must give them as much help as is appropriate to their circumstances to make a decision themselves before acting on their behalf. This can include making sure they have all the information needed to make a decision, attempting different ways of communication, speaking to them at a particular time of day or in a place where they feel most comfortable, or having a close relative or friend present.



How do I decide if the Donor lacks capacity?

The term 'a person who lacks capacity' means someone who lacks capacity to make a particular decision or take a particular action for themselves at the time the decision or action needs to be taken. When assessing capacity you should consider the following:-

- Does the Donor have a general understanding of the decision they need to make and why?
- Does the Donor understand the consequences of making or not making the decision?
- Can they understand, retain, use and weigh up the information needed to decide?
- Can they then communicate that decision, in whatever form?

Please see chapter 4 of the Code for more detailed guidance on assessing capacity. If in doubt consider seeking professional guidance and assistance.

What are 'best interests'?

Unfortunately, the MCA does not define 'best interests'. However, the following is a useful checklist of the factors that you ought to consider and steps to take:-

- Make sure that all relevant circumstances of which you are aware, and which it is reasonable to regard as relevant, are considered.
- You should make all reasonable efforts to encourage and enable the Donor to take part in the decision.
- Take account of any past or present wishes, views, beliefs and values including religious, cultural and moral.
- Consider consulting family members, friends or carers or others close to the Donor.
- If the Donor is likely to regain capacity, can the decision be postponed?
- You should not make a decision based simply on the Donor's age, condition, appearance or behaviour.
- If the decision concerns the provision or withdrawal of life-sustaining treatment then you must not be motivated by a desire to end the Donor's life.

If there is a dispute over what are the 'best interests' of the Donor and you cannot reach agreement by talking to others then the OPG can advise on what steps to take next.

What type of decisions may I need to take?

Unless your power is restricted in any way, you can take any decisions the Donor could take themselves in respect of their health and welfare. This could include deciding where they live. You may also be able to consent to or refuse medical treatment on the Donor's behalf.

If the Donor has signed section 5 of the LPA and given consent, you may be able to make decisions about life sustaining treatment. It is therefore possible that you decide to withhold treatment even though this means the Donor may die, provided this decision would be in their best interests. This is clearly a very onerous responsibility.

Please note that there are limitations on your powers imposed by the MCA. These include preventing you from consenting to a marriage/civil partnership, divorce, sexual relations or deciding to vote on behalf of the Donor.

Other matters of importance

- You must always act honestly and with integrity.
- You have a duty to keep the Donor's affairs confidential unless the Donor has given consent otherwise.
- You must carry out your duties personally and not delegate them to someone else. You can of course take professional or expert advice before making a decision.
- You must not benefit personally from any decisions you make.
- You must not give up your role as Attorney without first notifying the Donor and the OPG.
- You are allowed to claim out-of-pocket expenses provided they are reasonable but cannot be paid for acting as Attorney unless the Donor has specifically authorised this.

Carolyn Bagley



Partner
Milton Keynes
01908 247015
carolynbagley@hewitsons.com

Kerri Woodrow



Partner
Northampton
01604 463350
kerriwoodrow@hewitsons.com

Francesca Rossi



Associate
London
020 7400 5037
francescarossi@hewitsons.com

Katherine Hague



Associate
Cambridge
01223 532749
katherinehague@hewitsons.com



We pride ourselves on delivering an outstanding service to a wide range of individuals, businesses and institutions including charities, educational and sports bodies. The firm's size and breadth of specialisms means each client receives the focus it requires. We operate UK wide and have worldwide reach via our network of independent law firms, LawExchange International.

This document is written as an outline guide only and any action should not be based solely on the information given here. Appropriate professional advice should always be taken in specific instances.

Hewitsons LLP is authorised and regulated by the Solicitors Regulation Authority.