



**Durham
Safeguarding Adults
Partnership**



**The Mental Capacity Act
and safeguarding adults:
what good looks like.
Next of Kin, Living Wills,
Attorneys, Deputies and
the Office of the Public
Guardian**



**All about the
Mental
Capacity Act
2005 (MCA) and
safeguarding
adults in a
bitesize series:
more coming
soon.**

**Click on a topic
to go straight
there.**

Contents

When does someone lack capacity?	2
The next of kin myth	2
Key practice points	3
A Living Will	4
Some checks to make	5
Working with Attorneys and Deputies: Key practice points	5
What are attorneys?	5
And deputies?	6
Lasting Power of Attorney myths	6
When can your attorneys make decisions?	7
When do decision makers look for an attorney or deputy?	7
If someone says they are an attorney what must you check?	8
When attorneys or deputies don't act in Best Interests	9
Office of the Public Guardian comms	10
More MCA Resources	11

When does someone lack capacity?

- A person lacks capacity under the Mental Capacity Act 2005 if, at the time it is needed, they cannot make a specific decision, take an action, or give consent, because of an impairment or a disturbance in the functioning of the mind or brain.
- It does not matter if the impairment or disturbance is permanent or temporary.
- Capacity is a legal definition not a medical diagnosis.

The next of kin myth

Did you know?

72%

of people believe that if they become unable to make decisions, their 'next of kin' can give consent for or refuse medical treatment or care or make health and welfare decisions such as if they should live in a care home.

73%

of people think that if they lost capacity to make decisions about finances, their partner could use their joint bank account and make decisions for them both.

They cannot.

'Next of Kin' has no legal basis

 **The phrase next of kin is misleading – it may mean either the nearest relative or the person most important to the patient/client.**

Next of kin details are often requested by services for contact and consultation. Given the lack of awareness that this does not allow relatives to give consent, this is a potential area of upset with family members.

When can family members make these types of decisions?

Family members can only make these decisions for a person aged 16 and over who does not have capacity to make them if:


- They have been given legal powers to make that specific decision by the person who must be an adult (18+), making a Lasting Power of Attorney (LPA). The LPA must be valid and activated with the Office of the Public Guardian (OPG).
- There is a Court of Protection order e.g. a Court Deputyship Order or short-term order, which has been applied for, usually by family or a local authority, that gives someone these powers.

Making decisions for someone who cannot



The Mental Capacity Act 2005 created powers for some people to legally make decisions for someone else:

- Attorneys – you can give the power to your attorneys if you have capacity to and are aged 18 and over.

 <https://www.gov.uk/power-of-attorney>

- The Court of Protection - can make decisions and orders including an urgent or emergency decision.
 - A Court appointed Deputy.
 - Other short-term options such as a Living Will or Advance Decision, once aged 18.
-  <https://www.gov.uk/guidance/short-term-options-for-health-welfare-and-financial-decisions>

Other ways to make decisions for someone else include:

- Becoming an appointee – for Department of Work and Pension benefits only.
-  <https://www.gov.uk/become-appointee-for-someone-claiming-benefits>
- A Court appointed Guardian - if a person is missing; can make financial and property decisions only.
-  <https://www.gov.uk/government/news/new-law-to-help-manage-affairs-of-people-who-are-missing>

Who else decides?

If there are no valid arrangements for attorneys or deputies made under the MCA, the Best Interests decision making process must be used as set out in the MCA Section 4.

- Professionals will make formal Best Interests decisions as appropriate e.g. whether a person should move and live in a care home, or to have the Covid-19 vaccines.
- Medical consultants will make Best Interests decisions in hospital if you lack capacity to consent to treatment e.g. after a car accident you are in a coma or intubated for Covid-19 treatment.
- Family members or care workers will make informal Best Interests decisions about day-to-day matters: what you eat, wear, do.
- The Court of Protection hears and decides difficult, complex, or disputed cases.

Do family become involved in formal Best Interests decisions?

- Family, friends, and care workers may be essential to give informed views and relevant expertise, especially about what the person would have wanted for themselves.
- They should be fully consulted as relevant in the Best Interests decision making process.

Key practice points:

- Do not assume who family members are, or believe who you are told, even when 'relatives' live-in – check your facts. [Learning from SARs, 2021].
- Do not assume which family members, friends or others are to be consulted – check how involved they really are in someone's life.
- Do not ask family members to sign care plans, end of life plans, other treatment options, or to give consent; unless they have the legal powers, it would not be valid.
- Be aware treatment or care that is not in someone's Best Interests or that is not an available option should not be considered even if family members ask for it.
- An Attorney or Deputy must always act in Best Interests; if they don't, report to the OPG.
- If disagreements cannot be resolved about important decisions, seek advice, and consider a timely application to the Court of Protection.

A Living Will

An Advance Decision to Refuse Treatment (ADRT), aka a Living Will/Advance Directive.



- A person must have capacity and be 18 or over to make a Living Will.
- It must set out the specific treatment being refused and circumstances that apply, including for Covid-19 and for life-sustaining treatment.
- It can be changed by the person anytime under MCA Section 24.
- It must be in writing, signed, and witnessed if about life-sustaining treatment.
- Only comes into effect at relevant time if person lacks capacity to consent to that treatment.
- It is legally binding; the person is not giving consent for the treatment.
- A Living Will overrides Best Interests and must be followed.
- Advances in medicine may make Living Wills less relevant.

When is a Living Will not valid or over-ruled?

- If contradicted or withdrawn by the person after they made it. Withdrawal or partial withdrawal does not need to be in writing under the MCA Section 24.
- If the person created an LPA, with the relevant power/clauses and about the specific treatment under consideration after they made the Living Will, the attorney can override it under the MCA, Section 25.
- If the person has done anything else clearly inconsistent with the Living Will remaining their fixed decision, under the MCA Section 25.

If there is doubt or conflict

- Seek legal advice and the matter must go to the Court of Protection.
- Nothing in an apparent advance decision prevents providing life-sustaining treatment or preventing deterioration while seeking a Court decision.
- Attorneys and deputies must act in the person's Best Interests, which may be different to what the person would have wanted.
- A court appointed deputy can never refuse life-saving treatment.

Do Not Attempt Cardio-Pulmonary Resuscitation (DNACPR)

- A Living Will or ADRT is not the same as a DNACPR decision.
- A DNACPR decision is made by medical staff, in consultation with the person, their family and care staff, as part of advance planning.
- Family members cannot make a DNACPR decision.

An Advance Statement

- An advance statement is not the same as a Living Will (advance directive or ADRT).
- An advance statement sets out your preferences, wishes, beliefs and values about your future care and treatment, and must be in writing.
- It provides relevant information to take into account by anyone who is taking a Best interests decision for you, if you have lost the capacity to make decisions or to communicate them.
- An advance statement is not legally binding.

 [Advance statement about your wishes - NHS \(www.nhs.uk\)](https://www.nhs.uk)

Some checks to make

- Family members are who they say they are.
- The adult freely wishes their family's involvement.
- Are there any written statements about wishes for future care?
- A Living Will was made by the person and is relevant to the specific treatment under consideration.

Working with Attorneys and Deputies: Key practice points

- Find out if there is an attorney or deputy before you begin any best interests decision making process
- If there are attorneys and / or a deputy, or someone says they are, check they are genuine.
- Check that a Lasting Power of Attorney (LPA) is valid, activated, and gives the relevant powers to make the decision (more below).
- Not all attorneys can make health and welfare decisions, you will need to check
- Short term orders can be applied for instead of a deputyship
- Can attorneys act jointly (all must agree) or severally (a decision can be made by only one)?
- Stress the importance of appointing an attorney and writing any specific advance decisions to refuse treatment (as above in a living will) if your client has a deteriorating condition.

What are attorneys?

Adults may have appointed one or more people, 'attorneys', to make decisions on their behalf.

There are two types of Lasting Powers of Attorney that can be made and registered:



Property and Financial Affairs LPA



Health and welfare (care) LPA, includes life-sustaining treatment

A person may have one or the other, or both.

Enduring Power of Attorneys (EPA) were in place before the MCA 2005 went live in 2007.

- They are still valid if registered but can **only** cover property and financial affairs.
- Family members may not realise that an EPA does not cover health and welfare decisions.

Once drawn up (executed) an LPA or EPA must be registered with Office of the Public Guardian (OPG) to be valid and in use.

Checks must be made to ensure the attorney is genuine and that the LPA is valid.


And deputies?

The Court of Protection can make a Deputy Court Order which nominates someone ('deputy') to make decisions for a person, which has been applied for by for example family, friends, or a local authority that gives someone these powers.


Deputy Court Orders are made if there is family disagreement, or for long term help in making decisions for adults who have care and support needs and lack capacity for major decisions. A Deputyship order can be made for children


Deputies can make decisions about personal welfare including healthcare; or property and financial affairs; or both. Deputies cannot refuse life-sustaining treatment.


Lasting Power of Attorney myths

 It's complicated and you need a solicitor to make an LPA.


 **No – you can apply yourself, it's very straightforward, and the application comes with step-by-step guidance.**

 You can wait to make an LPA until it is needed?

 **No – you have to have capacity to make one. If a person has a neurodegenerative illness, such as early-stage dementia, they may need to do it sooner rather than later.**


 It means you lose control.

 **No – a health and welfare LPA is only activated once you have lost capacity for those decisions. If it's a financial LPA and active while you have capacity, it's only valid when you give consent.**


 It's only for older people?

 **Younger people play sports, take risks, have accidents, fall ill suddenly; if there's no LPA, family or partner cannot make decisions on your behalf.**


 It's expensive.


 **Each LPA costs £82 if you apply yourself, with some reductions for people on benefits or low income (see link below). But an LPA is cheaper and much quicker than applying for a deputyship court order. If you use a solicitor to do the paperwork and /or to be the attorney, there will be additional solicitor's fees.**

 [Lasting or enduring power of attorney fee: exemption or remission - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/lasting-or-enduring-power-of-attorney-fee-exemption-or-remission)

 I am a signatory to mum's bank account / we have a joint account, so it'll be fine

 **Banks will freeze both sole and joint accounts if one person loses capacity. And you do not have the authority to deal with bills, from providers or utilities.**

 It's best to appoint all my children and partner to act together jointly

 **The LPA will be useless if one dies or becomes incapacitated, even supposing they always agreed! Consider, with legal advice, appointing your attorneys 'jointly and severally' – that means they can all act together, or just one can make the decision.**

When can your attorneys make decisions?

Health and Welfare LPA



Can only be used to make a best interests decision if and when you, the donor, do not have the mental capacity, even with every support, to make that decision at the time it needs to be made.

Property and Financial Affairs LPA



When you, the donor, create the property and financial affairs LPA you can choose for your attorney/s to make decisions as soon as the LPA is registered with the Office of the Public Guardian. In that case, as you still have capacity to make property and financial decisions, the attorney must obtain your consent to make any decision. And you can continue to make decisions on your own.

Or you can choose that the attorney can only make a best interests decision if and when you do not have the mental capacity to make the property and/or financial decision.

When do decision makers look for an attorney or deputy?

You must find out if there is an attorney or deputy before you begin the best interests decision making process (without delaying life sustaining emergency treatment).



To find out if there is an attorney you can search the Office of the Public Guardian (OPG) register

- OPG 24-hour urgent and rapid response target on Mondays to Fridays
- Monday priority response for urgent and rapid weekend requests



Urgent enquiries: safeguarding enquiry or adult at risk

- For NHS, police, and local authorities to use
- Email subject line: 'Initial safeguarding enquiry' or 'Urgent enquiries'



Rapid response for Covid-19 patients

- For NHS and local authority social care to use
- Email subject line: 'COVID-19', or 'COVID-19 vaccination' for vaccination requests



Standard process

- For all other searches there's a form to download and it takes five working days



- Email templates, address, and details are all on Government website
- Don't use encrypted email software – it slows down the process; use accredited address e.g. @nhs.uk @gov.uk @pnn.police.uk



[Urgent enquiries: check if someone has an attorney or deputy - GOV.UK \(www.gov.uk\)](http://www.gov.uk)



[NHS and social care staff: check if a COVID-19 patient has an attorney or deputy - GOV.UK \(www.gov.uk\)](http://www.gov.uk)

If there are attorney or deputies, contact details are supplied by the OPG.



- Information given about an attorney's powers or court orders includes any restrictions, whether they have authority over life-sustaining treatment, how they can act if more than one, and if it is registered, cancelled, revoked, or expired.

Consult the Attorney or Deputy when decisions need to be made for someone who lacks capacity to give consent for that decision, as the Attorney or Deputy may be able to give consent.

If someone says that they are an attorney what must you check?

If someone says that they are an attorney, you must see Lasting Power of Attorney, check that it is genuine, what type it is, its specific powers and any restrictions, and that it has been stamped and dated by the Court of Protection to be activated.

You can ask to see the original paper, or a certified copy, or if the order is recent you can use the OPG 'Use a Lasting Power of Attorney service' as below.

Online LPA forms

- The LPA application form is to be completed by the person
- It needs completing, printing, signing by all parties in order, and posting to the OPG to apply and register
- 20 plus pages in length
- The bottom of each page must have the OPG perforated stamp saying VALIDATED OPG for the LPA to be valid and used by an attorney

Online LPA health and welfare decisions form, LP1H



[LP1H Lasting power of attorney - Health and care decisions \(publishing.service.gov.uk\)](http://publishing.service.gov.uk)

Online LPA financial decisions form, LPF1



[LP1F Lasting power of attorney - Financial decisions \(publishing.service.gov.uk\)](http://publishing.service.gov.uk)

The 'Use a lasting power of attorney' service

 [Use a lasting power of attorney - GOV.UK \(www.gov.uk\)](https://www.gov.uk)

- Office of the Public Guardian online service was launched in 2020.
- Currently for LPAs registered on or after 1 September 2019.
- Enables attorneys and donors to share a summary of the LPA with a third party (in this case you, the involved professional) – they ask for an access code.
- The secure access code lets the third party view the LPA summary online:
 - Check if LPA is valid.
 - See who the attorneys are.
 - It states if there are specific 'instructions' but not any details (most LPAs do not have any).
- If the summary says there **are** specific instructions, you then need to also see the Court stamped paper copy as those instructions must be followed by the attorney.
- You don't need to create an account or register to use the service and if you prefer, you can still ask to see the original paper LPA or a certified copy.
- Find out more, and see an example LPA summary, on the [Office of the Public Guardian blog](#).

Sample Court of Protection Order nominating a Deputy

- The Court stamp and date is at the top of this sample order which is an older scanned paper copy

 [Deputyship-court-order-sample.pdf \(publishing.service.gov.uk\)](#)

Supervision of deputies by OPG

- Office of the Public Guardian supervision can include visits to the deputy.
- Person's capacity assessed for each decision.
- Deputy must inform OPG when making important decision e.g. selling client's home.
- OPG approval to be sought to pay third party for work.
- Person's money and property must be kept separate to deputy's.
- Receipts to be kept.
- High standard of care to be applied.
- Decisions and financial record reported in annual report to OPG.

Short term options without making an LPA or deputyship

- Summary of other options such as advance statements, Living Wills

 <https://www.gov.uk/guidance/short-term-options-for-health-welfare-and-financial-decisions>

When attorneys or deputies don't act in Best Interests



"Attorneys are in a position of trust and so there is always a risk of them abusing their position"

Mental Capacity Act Code of Practice

Signs you might notice:

- Attorney moved in but didn't live there before.
- Stopping care workers seeing the person.

- Taking the person out of hospital against medical advice.
- Attorney spending money in an extravagant or unusual way.
- Unpaid bills.

The Mental Capacity Act 2005 created a criminal offence



It is a criminal offence for *anyone* including family members, partners, health and care staff, or an Attorney or Deputy, to ill-treat or wilfully neglect someone in their care who lacks capacity to make decisions themselves.

MCA Section 44

When to notify Office of Public Guardian?

If you suspect abuse or neglect by an Attorney or a Deputy, for example they cannot carry out duties as they live too far away, or they are not making decisions in the person's Best Interests:

- Refer ASAP to the Office of the Public Guardian (OPG)
- Make a safeguarding adults report to Social Care Direct on 03000 267 979
- Call the police if there is a crime
- Refer to the Care quality Commission (CQC) if relevant

The OPG will look into it in more detail.

Email opg.safeguardingunit@publicguardian.gov.uk

Call 0115 93 42 777



<https://www.gov.uk/report-concern-about-attorney-deputy-guardian>

Case example – application by the OPG to revoke an LPA



[Court of Protection Hub Case summaries - Court of Protection Hub](#)

Office of the Public Guardian comms

There are Office of the Public Guardian social media accounts, a newsletter, and a Blog...<https://publicguardian.blog.gov.uk> for example,

- March 2021 OPG Blog: 'Getting started as an attorney or deputy' with useful tips and ideas to make sure you are acting in best way possible, with scenarios
- 'Your voice, your decision' campaign: easy steps to make an LPA, films, call to become an LPA Partner

To apply for an LPA

1. Complete the online form.
2. Ensure the guidance is read/followed and obtain legal advice if you are unsure.
3. Plus complete the additional form if you are seeking the reduced price.
4. Before registering with the OPG, you must notify anyone those listed in the form as a person to notify (not everyone chooses to have them) that you are going to make it a live order.
5. Print the form, obtain signatures in order, and post to OPG.
6. There are 3 weeks to raise any concerns with OPG.
7. It takes up to 20 weeks to register with OPG – if there are no mistakes! This includes a four-week waiting period required by law.



The Mental Capacity Act and safeguarding adults, what good looks like. Practice guides in this series

1. What is capacity, the MCA, who uses it? The Court of Protection
2. Capacity assessment process
3. Challenges in capacity assessment e.g. fluctuating capacity, reluctance to engage
4. Preferred communication (for all practicable support)
5. Top tips, with a working example of safeguarding when capacity is a feature
6. Assessment form sample and expected standards
7. Next of Kin, Living Wills, Attorneys, Deputies, and the role of the Office of the Public Guardian (this one)
8. Best Interests decision making process

More MCA resources



[The Mental Capacity Act 2005](#)



[MCA Statutory Code of Practice](#) which staff working with or caring for adults who lack capacity to make decisions for themselves have a legal duty to consider.



Lasting Power of Attorney - your voice, your decision

<https://powerofattorney.campaign.gov.uk/>

Office of the Public Guardian registers

Check whether someone has an attorney or deputy or that the attorney is genuine by applying to search the OPG registers.

- For police, local authorities, and NHS to make an urgent check for an adult at risk or during a safeguarding enquiry visit:



[Urgent enquiries: check if someone has an attorney or deputy - GOV.UK](#)



● Rapid response for NHS, local authorities, and social care providers during Covid-19 visit:



[NHS and social care staff: check if a COVID-19 patient has an attorney or deputy - GOV.UK](#)



● Standard checks, usually takes 5 working days



[Find someone's attorney, deputy, or guardian - GOV.UK](#)

My Decisions

Online service run by Compassion in Dying to support people making a living will



<http://mydecisions.org.uk>



[Short-term options for health, welfare and financial decisions - GOV.UK \(www.gov.uk\)](#)



[Make, register or end a lasting power of attorney - GOV.UK \(www.gov.uk\)](#)