

Capacity Issues and Lasting Powers of Attorney

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In this fortnight's Private Wealth Planning series briefing, senior associate [Clarissa Ferguson](#) looks at capacity and the steps you can take before it is too late.

What is incapacity?

Mental incapacity is the inability to do something or to provide consent for something by reason of a mental disorder or disability. Mental capacity is not always constant and can fluctuate.

Why is capacity important in a legal context?

You must have mental capacity to: provide your consent, contract with another party, make gifts, settle property and enter into legal documents including making or revoking a Will. Testamentary capacity is a vital factor in the making of a Will and without it, a Will is invalid.

How is it assessed?

You must be assumed to have capacity unless it is established that you lack capacity. A lack of capacity should not be confused with making bad or odd decisions; everyone is entitled to make decisions that others may not agree with.

The test for mental capacity is found in the Mental Capacity Act 2005. For the purposes of the Act, a person lacks capacity in relation to a matter if at the material time they are unable to make a decision for themselves in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain. A person is unable to make a decision for themselves if they are unable:

- (i) to understand the information relevant to the decision;
- (ii) to retain that information;
- (iii) to use or weigh that information as part of the process of making the decision; or
- (iv) to communicate their decision.

Are there any tests specifically relating to entering into a Will?

The test for testamentary capacity is set out in the case of *Banks v Goodfellow*, according to which a person has testamentary capacity where they:

- (i) understand the nature of the Will and its effect;
- (ii) have some understanding of the extent of the property that they are disposing of under their Will;
- (iii) are aware of the persons for whom they would usually be expected to provide; and
- (iv) are free from any delusion of the mind that interferes with how they would dispose of their property under a Will.

Can I plan for a loss of capacity in advance?

You can put in place a Lasting Power of Attorney (LPA) under which you confer a power to another person (referred to as the attorney) to act on your behalf in relation to certain decisions if you are unable to make those decisions by yourself. There are two types of LPA:

1. A Property and Financial Affairs LPA, that grants authority for financial decisions; and
2. A Health and Welfare LPA that grants authority for health and welfare decisions.

You must have capacity to make an LPA at the time it is executed and, before an LPA can be used by your attorney, it must be registered with the Office of the Public Guardian (which is the government body that effectively polices the activities of attorneys and deputies). It takes approximately 20 weeks to register an LPA.

Once registered, a Property and Financial Affairs LPA can in fact be used even if you still have capacity provided that you have consented to its use. This may be of use if you were in hospital or elsewhere for any length of time and were unable to deal with your affairs.

What decisions can my Attorney make on my behalf and what obligations will they have?

Under an LPA for property and financial affairs, unless you restrict their power, your attorney will be able to manage your bank accounts, pay bills, buy and sell your property and deal with any investments you have. Your attorney will not be able to make large financial gifts from your estate or use their position to make any personal gain.

An attorney cannot change your Will or carry out any tax planning without authority from the Court of Protection. They will also not step into your shoes in your capacity as a company director or a trustee.

Under an LPA for health and welfare, unless you restrict their power, your attorney will be able to make decisions about your medical treatments and about your personal care and where you live. You can also give them power to be able to give or refuse authority to life sustaining treatment on your behalf. Your attorney will not be able to make decisions that will restrict your freedom and would be expected to consult with medical practitioners in charge of your care.

An attorney must always act in your best interests and help you to make as many of your own decisions as you can.

What happens if I want to change my Attorneys?

For so long as you have capacity you can cancel your LPA and if you wish to do so, put a new one in place. An attorney must always act in your best interests and help you to make as many of your own decisions as you can.

What happens if I do not have an LPA in place and I lose capacity?

If you lose capacity and no-one has authority to make decisions on your behalf, an application can be made by a third party to the Court of Protection to be appointed as your deputy. Deputyship applications can be made for property and financial affairs and for personal welfare. However, it is very rare that the court will grant a Deputyship Order for personal welfare.

Applications to the Court of Protection can be relatively expensive and the process of applying for a Deputyship Order usually takes four to six months and longer if the application is contested or if the Court asks for additional information and assessments.

What is the jurisdictional scope of my LPAs?

Subject to any local laws, LPAs will only be operative in relation to your UK-situated assets or in relation to your health and welfare if you become incapacitated whilst you are in the UK.

If you would like to discuss any of the issues raised, please do not hesitate to contact the author or your usual Payne Hicks Beach contact



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