

THE MENTAL CAPACITY ACT 2005

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The Mental Capacity Act 2005 came into force on 1st October 2007. Enduring Powers of Attorney (EPAs) executed by both the donor and the attorneys before 1st October 2007 will remain in force, but no new EPAs can be made. The 2005 Act introduces Lasting Powers of Attorney (LPAs), which are different in a number of important respects:–

- LPAs confer no authority on the attorneys until they are registered.
- The forms are more complex.
- Lasting powers of attorney can cover personal welfare as well as property and affairs.
- The registration fee is £150.

It follows that if a client wishes to appoint an attorney in connection with the sale or purchase of a property, he will normally be better advised to execute an ordinary power of attorney rather than an LPA.

Section 1 of the Act applies a number of general principles. First, a person must be assumed to have capacity unless it is established that he lacks capacity. Secondly, a person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success. Thirdly, a person is not to be treated as unable to make a decision merely because he makes an unwise decision. Fourthly, an act done, or a decision made, under the 2005 Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests. Fifthly, before any act is done, or a decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

A person may have capacity for some purposes and not for others. Section 2 (1) says that for the purposes of the 2005 Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in

relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain. It does not matter whether the impairment or disturbance is permanent or temporary.

Section 3 says that for the purposes of Section 2, a person is unable to make a decision for himself if he is unable:

- to understand the information relevant to the decision
- to retain that information
- to use or weigh that information as part of the process of making the decision, or
- to communicate his decision (whether by talking, using sign language or any other means).

The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.

Sub-section (4) states that the information relevant to a decision includes information about the reasonably foreseeable consequences of deciding one way or another or of failing to make a decision at all.

Section 42 provides for the introduction of a code of practice, and sub-section (4) states that it is the duty of a person to have regard to any relevant code if he is acting in relation to a person who lacks capacity and is doing so in a professional capacity.

The Act runs to 69 sections and 7 schedules. The above is only a very brief summary of a few salient points, and if you require further information, please contact us.

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