

## Housing LIN INFORMATION SHEET: MCA - no. 1

### The Mental Capacity Act 2005: Substitute Decision-making and Agency

*This information sheet is one of four that accompanies the Housing LIN factsheet Housing Provision and the Mental Capacity Act 2005*

It has long been the law that one person, the “principal”, can authorise another, the “agent”, to make decisions on her/his behalf both whilst he or she has capacity and from the point at which it is lost, if special procedures are followed. Usually, the arrangement is by agreement and there is a formal document setting out what decisions the agent is entitled to make on behalf of the principal. In addition, some agency arrangements are imposed either by specific statutes or under the common law doctrine of agency of necessity, even where this may be against the stated will of the principal. Such an arrangement will only be upheld by the law if the principal lacks capacity and it is absolutely necessary for someone else to take on the role of substitute decision maker.

Where someone is lawfully appointed as an agent and is acting within the authority given to them, they are entitled not only to make a decision on behalf of the principal which is binding on the principal, but should be treated by others as if they were the principal. For instance, they may have a right of access to information held by a third party relating to the principal if the information is relevant to the nature of the authority given by the principle. They may also have the ability to make a complaint on behalf of a principal or initiate legal proceedings against a third party, depending on the authority actually given, and its source. It is important therefore that those who are responsible for caring for or providing services to a principal ensure that the agent is acting within their powers and according to the duties they owe to their principal so that any arrangements agreed by the third party are effective.

This fact sheet will look at the mechanisms currently available, and those that will become available, under the Mental Capacity Act 2005, for agency and substitute decision-making. It will also detail the legal requirements necessary for such arrangements and the limitations and duties imposed on agents.

#### **Powers of Attorney**

A power of attorney, provided it is properly executed, allows an agent or “donee” to stand in the shoes of the principal or “donor” for whatever matters the document conferring the power of attorney permits, so long as the matters are within the legal

scope of a power of attorney. An enduring power of attorney is limited to substitute decision making in respect of property and financial affairs. However, under the new Act there is scope for a donor to grant substitute decision making powers to another in respect of their health and some of their personal welfare decisions. Full details are given below.

It is worth noting that where a power of attorney is properly used the donee is authorised to make a decision or agree to a course of action as if he were the donor and the donor is bound by the donee's words or actions. If the donee does not honour the agreement on behalf of the donor then it is the donor who is liable. A donee could only be personally liable for any of his/her actions if s/he does not disclose to a third party that s/he is acting on behalf of the donor in the first place, or if the donee had entered into a free-standing personal guarantee of the donor's obligations or an indemnity against damage done by the donor.

The donee of a properly executed **general ordinary Power of Attorney** will have the authority to enter into contracts, purchase or sell goods or land and buy services on behalf of the donor, but only whilst the donor has full capacity (ie. acting like a manager for the principal). The power ends on the loss of capacity of the donor. The donee can *only* act as agent in respect of matters relating to the donor's property or financial affairs.

The donee of an **Enduring Power of Attorney** is also able to make decisions and contract on behalf of a fully capacitated person in much the same way as those acting under a general power do. Again this power only relates to actions and decision-making in respect of the donor's property and financial affairs. However, unlike a general power, as soon as the donee has reason to believe that the donor has lost capacity, the donee must make an application to the Court of Protection to register the document which created the power and must give notice of the proposed registration to anyone with an interest, including the donor. The registration process gives those with an interest an opportunity to challenge the donee's assessment of the donor's capacity or the validity of the document. If matters which require action occur between the donor losing capacity and the registration of the instrument, then the donee can not do anything under the authority except maintain the donor and protect his property and himself unless a transaction is specifically authorised by the court. If the Court suspects that the donor has become incapacitated and is of the opinion that it is necessary, before the instrument is registered, to exercise any power which the Court could exercise on its registration, then the Court can exercise that power regardless of whether the attorney has applied to register the power.

The effect of the registration of an instrument creating an Enduring Power of Attorney is that the donor cannot amend the power in any way, nor can he revoke the power unless and until the court confirms the revocation. In addition the donee cannot disclaim the power unless he gives notice of the disclaimer to the court.

From October 2007 no new documents conferring an Enduring Power of Attorney can be created. However, s66 of the Mental Capacity Act 2005 makes it clear that any document which lawfully created such a power prior to October 2007 will still be effective. From this date Schedule 4 of the Mental Capacity Act 2005 will govern how Enduring Power of Attorney donees must operate.

Under the Mental Capacity Act 2005, from October 2007, someone with capacity who is 18 or over will be able to create a document authorising one or more agent(s) to make decisions and carry out any necessary actions in respect of their property and financial matters and, for the first time, their health and some welfare decisions. This new power, known as a **Lasting Power of Attorney**, will allow a donee to make decisions on behalf of the donor provided that the document creating the power is valid and registered.

In order for the document conferring a Lasting Power of Attorney to be valid it must be executed on the prescribed form, and be accompanied by an LPA certificate signed by an independent third party who is required to verify not only that he or she believes that the donor had capacity to grant the power, but also was not coerced, put under undue pressure or deceived into creating the power.

Regulation 8 of the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations lays down who may sign an LPA certificate, subject to being excluded by reg 8 para 3.

It can be

(a) a person chosen by the donor as being someone who has known him personally for the period of at least two years which ends immediately before the date on which that person signs the LPA certificate;

or

(b) a person chosen by the donor who, on account of his professional skills and expertise, reasonably considers that he is competent to make the judgments necessary to certify the matters set out in paragraph (2)(1)(e) of Schedule 1 to the Act.

Examples are given of suitable professionals:

(a) a registered health care professional;

(b) a barrister, solicitor or advocate called or admitted in any part of the United Kingdom;

(c) a registered social worker

(d) an independent mental capacity advocate.

The disqualifications cover anyone who is -

(a) a family member of the donor;

(b) the intended donee of the power;

(c) the donee of

(i) any other lasting power of attorney, or

(ii) an enduring power of attorney,

which has been executed by the donor (whether or not it has been revoked);

(d) a family member of a donee within sub-paragraph (b);

(e) a director or employee of a trust corporation acting as a donee within sub-paragraph (b);

(f) a business partner or employee of—

(i) the donor, or

(ii) a donee within sub-paragraph (b);

(g) an owner, director, manager or employee of any care home in which the donor is living when the instrument is executed; or

(h) a family member of a person within sub-paragraph (g).

Finally the document must be registered with the Office of the Public Guardian. Once the document is registered a donee can make decisions and act in relation to these decisions as the agent of the donor in relation to any of the principal's property or financial affairs even where the donor has capacity to act/make decisions on these matters themselves (unless the donor has specifically put off that power until loss of capacity.) They are purely acting as an agent for their principal in the same way as they would under a General or unregistered Enduring Power of Attorney.

Registration of a Lasting Power of Attorney will not automatically prevent a donor revoking or amending the power (as the registration of a current Enduring power does) provided they still have capacity to do so. S13(2) MCA allows the donor to revoke the power at any time he has capacity to do so. Regulation 21 of the new Regulations requires that a donor who revokes a lasting power of attorney must notify the Public Guardian that he has done so and notify the donee of the revocation. No forms are prescribed for revocation, however, so oral notification must be good enough, it is thought. The Public Guardian has to be **satisfied** that the donor has taken such steps as are necessary in law to revoke the LPA. No guidance is given in the Code as to the status of the LPA pending cancellation of the instrument by the Public Guardian..

However it is important to note that a donee of an LPA cannot act or make any decisions on behalf of the donor where these relate to the donor's health or welfare, unless the donee reasonably believes that the donor lacks capacity on that specific issue at the time that the decision is to be made. If the donor does not want the donee making decisions regarding their health care but has created a personal welfare LPA, then again the document must clearly state this prohibition, because otherwise a general welfare LPA takes effect so as to extend to day-to-day medical treatment.

The requirement for the document to be registered before the donee can substitute his or her decisions for the donor's introduces a formal stage into the creation of the power, rather than at the point where the donor loses capacity. It can be difficult for those acting on the basis of the decision of an LPA donee to verify that he or she is lawfully able to make the decision on behalf of the principal (the donor of the Lasting Power of Attorney). The Mental Capacity Act 2005 and the related Code of Practice do not specifically address this difficulty; however it is clear that the donee of an LPA is obliged to have regard to the Act and the Code, both of which establish clear duties and limitations on the donee, designed to safeguard the donor from abuse. In particular the Act and Code require that a donee comply with the principles as set out in s1 of the Act. Therefore, where the donee only has authority to act when the donor has lost capacity, eg. if it is a personal welfare decision, they will need to satisfy themselves (and possibly provide evidence where there is a dispute) that they have done everything practicable to maximise the donor's ability to make the decision for themselves, that they reasonably believe the donor lacks capacity at that time on the issue in question, and that it is not practicable or in the donor's best interests to wait until the donor has regained capacity and that the donee believes that the decision made is in the best interests of the incapacitated person.

In addition to these safeguards the Act and Code place a number of specific duties on donees of both the Financial and Property and Personal Welfare Lasting Powers of Attorney. A donee must not benefit from their appointment or any decisions they make on behalf of the donor (fiduciary duty); they owe the donor a duty to care to

perform the task and make decisions with due skill; they also owe the donor a duty of good faith and confidentiality and are not allowed to delegate their duties or give up their role without notifying the donor or the Court of Protection. Donees are also obliged to comply with Court of Protection orders, including where necessary reporting to the Court or Office of the Public Guardian and, if they have financial and property decision-making powers, to provide accounts and keep the donor's money separate from their own.

Finally, the Act imposes additional safeguards to limit the opportunity for financial abuse by a donee: for example if the donee is declared bankrupt this automatically revokes their powers to make any decisions relating to the donor's property and affairs; and where the donee is subject to an interim bankruptcy order then the powers are suspended. Note however that bankruptcy of a donee will not revoke the powers to make personal welfare decisions where there is a Personal Welfare Lasting Power of Attorney. Neither does the dissolution of a marriage or civil partnership between the donor and the donee automatically revoke a donee's powers, unless the document specifically states this.

## **Court of Protection Receiver**

Up until October 2007, the Court of Protection can substitute its own decisions for those of a person it is satisfied is incapable, by reason of mental disorder, of managing and administering his/her property or affairs. This power is limited to intervening only in respect of the individual's financial and property matters. It does not have any authority to intervene in respect of the individual's health or personal welfare. Where such intervention may be necessary the High Court's inherent jurisdiction must be invoked (an application for declaratory relief).

The High Court can also appoint a receiver under the Supreme Court Act, s37, within declaratory relief proceedings, in the best interests of the defendant, without the applicant having to go through the Court of Protection regime under the Mental Health Act (see *Sunderland City Council v PS and CA*).

Under the current (pre-October 2007) statutory regime the current Court of Protection can make orders or such directions as are necessary to control and manage the property or finances of the incapacitated individual. This includes the power to appoint a receiver to manage the person's property and financial affairs on a daily basis. The scope of each receiver's substitute decision-making powers will be set out in full on the order appointing them as the receiver. Any matters which fall outside the scope of the order given must be referred for consideration by the Court of Protection.

From October 2007 the current Court of Protection regime and the role of receiver will cease to exist. Those currently acting as Court of Protection receivers will continue in their role as substitute decision-maker for the incapacitated adult in respect of their property and financial matters, but will become property and financial Deputies under the control of the New Court of Protection. Receivership under the Supreme Court Act is not being altered, however.

## **New Court of Protection**

The Mental Capacity Act 2005 establishes a new Court of Protection with wider powers to intervene and make declarations regarding best interests and to make financial and property related decisions in substitution for those of the incapacitated adult. From October 2007 the Court of Protection will have specific authority to make decisions on behalf of incapacitated persons over the age of 16 in respect of financial and property matters and, for the first time, declarations about the incapacitated person's health and personal welfare, once the age of 16 is reached. The new Court will continue the declaratory relief jurisdiction of the High Court in relation to incapacitated adults.

It can:

- Confirm the legitimacy of another's person/body's decision to act or withhold action in respect of an incapacitated person, by making a declaration;
- Appoint a named person to act as Deputy of the Court and make decisions in respect of the individual under the authority of the Court.

The Act also sets out clear limitations on the Court's ability to make decisions or authorise anyone else to make decisions in respect of an incapacitated person. For instance the Court can not:

- Make a decision for anyone where they believe that person has capacity on that issue;
- Overturn a valid and applicable advance decision;
- Enforce an advance decision for positive treatment; or
- Make a substitute decision concerning an individual's -
  - family relationships, including consent to marriage or civil partnership, sexual relationships, divorce, placing a child for adoption, taking over parental responsibility for a child, or consent to fertility treatment;
  - consent to treatment for mental disorder of people who are liable for detention and treatment under the Mental Health Act 1983;
  - authorise the casting of a vote at an election or a referendum on behalf of a person lacking capacity to vote.

In addition to these limitations imposed by the Act, the Code and the Rules of the Court state that the Court will be expected to comply with the key principles of the Mental Capacity Act, including that any intervention should only be authorised after consideration as to whether it is the least restrictive measure that is appropriate. For that reason the Court is expecting to be used as a last resort to resolve intractable disagreements or very serious justiciable matters (i.e. matters capable of legal consideration). Where the Court is required to make an order, the Code clarifies that single orders are preferred over those that would allow for continued intervention, unless this is necessary.

## **Court of Protection Deputy**

From October 2007 the new Court of Protection will have statutory authority to appoint, where necessary, any individual aged 18+, to make decisions on behalf of an incapacitated person. Where the power relates solely to the incapacitated person's property and affairs a trust corporation may also be appointed a deputy. The named person can be a friend or relative of the incapacitated person or the holder of a specified position or office, eg. the director of social services in the area, but the order must name the individual rather than the office. Again an appointed Deputy becomes the agent of the incapacitated adult and should be treated by

others as the principal for those decisions within his/her power to make. It is envisaged that Deputyship will be used where the incapacitated person requires regular and long-term substitute decision-making, but lacks the necessary capacity to appoint someone as their agent under a Lasting Power of Attorney.

For this reason the Mental Capacity Act and Code imposes similar safeguards against abuse as are in place in respect of those acting under a Lasting Power of Attorney.

Again any deputy must act/make decisions only within the scope of the powers given to them by the Court of Protection and, when so acting, must do so with according to the principles laid out in s1 of the Act and Code.

Whilst they are entitled to reimburse themselves for any expenses out of the principal's estate they must, where ordered by the Court, provide a security and submit reports to the Public Guardian.

A Deputy is unable to override a lawfully-made decision of a donee acting under a Lasting Power of Attorney and the Court can not authorise a deputy to make decisions which would prevent a person from having contact with the incapacitated adult or change the named person responsible for the individual healthcare, as these are decisions for the Court alone. Specific limitations to a Deputy's powers are set out in section 20 of the Mental Capacity Act including prohibiting a deputy from refusing life-sustaining treatment for the principal, making a substitute decision which would amount to restraint of the principal (unless additional safeguards are met including that the act is expressly within the powers given to the Deputy by the Court) or a deprivation of the principal's liberty. Nor can a deputy act for their principal in matters which by statute require the principal's capacitated personal authorisation, eg. signing a will.

## **Others with specific limited powers of substitute decision making**

### **A Department for Work and Pensions Appointee**

Where someone entitled to claim welfare benefits is deemed "unable to act" as a result of a physical or mental incapacity, an "appointee" may be given the authority by the DWP to manage the incapacitated person's welfare benefit claim. They must be suitable to do the duties required of them. A suitable appointee is:

- acceptable to the claimant
- capable of managing the claimant's affairs and can be trusted to do so in the interests of the claimant
- in regular contact with the claimant and has enough knowledge of the claimant's circumstances to notify the authority of relevant changes of circumstances and answer authority enquiries
- fully aware of the responsibilities of being an appointee, for example aware they are responsible for repaying overpaid benefit
- someone who has no potential for a conflict of interest

Appointees are responsible for finding out what benefits the incapacitated person is entitled to, completing and submitting the application as if they were the person and informing the DWP of any change in the person's circumstances. In addition the

appointee must carry out all instructions they receive including receiving benefits in their own name on behalf of the person and ensure that the money is used for that person's welfare. Appointees are authorised to act on behalf of the incapacitated person in relation to the management of their welfare benefit entitlement only, so do not have powers in relation to bequests, lottery wins, etc. They do not have the same responsibilities or liabilities as those acting under a Power of Attorney or deputyship.

### **Those acting in connection with the care and treatment of an incapacitated person**

The Mental Capacity Act introduces a statutory protection against civil and criminal prosecution for those required to act or substitute their decision-making for the incapacitated person, where this is done in connection with the care or treatment of an incapacitated adult and the person acting reasonably believed the individual thereby assisted, lacked capacity on the issue. In addition, to benefit from this protection, the person acting must have complied with the principles set out in s1 of the Act and the Code. In particular they must have a reasonable belief that the act/ decision is in the person's best interests. The term 'acts in connection with the care or treatment' is not defined. The Code explains this left deliberately wide, so that both informal, paid carers and public bodies are able to rely on this protection. No *statutory* defence exists where substitute decisions/acts are:

- in contravention of a lawful decision made by a deputy or a donee acting under a Lasting Power of Attorney
- done contrary to an apparently valid and applicable advance decision
- negligently performed
- amounting to restraint (unless additional safeguards are met)
- amounting to a deprivation of the incapacitated person's liberty.

But the defences may still exist at common law. The Act does not deal with what becomes of the common law defence of necessity. The answer to this conundrum can only be confirmed by the Court of Protection, or an ordinary court in an action for assault or some other civil law wrong, or a criminal court.

### **Conclusion**

Therefore, before accepting the authority of a substitute decision-maker, it would be prudent to check:

- the type of authority they are seeking to act under, eg. a Power of Attorney, Deputyship, ordinary common law appointment as an agent, a co-signatory of an account, an appointeeship etc.;
- if this is a power which is required to be in a certain format, obtain a copy of the document conferring the power so that it is possible to ascertain whether it has been properly executed and, where necessary, registered;
- whether the decision being made is one the holder has authority to make, ie. does the document give welfare/ health substitute decision-making powers and *specific* authority to refuse life-sustaining medical treatment where this is what is being asserted.
- whether the holder's authority has been revoked in any way (for revocation of a Lasting Power of Attorney see s13 MCA, the LPA Regulations, which



impose notification requirements, and MCA schedule 4 in respect of Enduring Power of Attorney).

- whether the substitute decision-maker is acting in compliance within their duties as set out in the Act and Code of Practice.
- whether there is any evidence on which one might form the view that the agent is not acting in the best interests of the individual or may be influenced by an obvious conflict of influence.

### **Other Information sheets in this series include:**

2. The Mental Capacity Act 2005: Lawful restraint or unlawful deprivation of liberty?
3. The Mental Capacity Act 2005: Paying for necessities and pledging credit
4. The Mental Capacity Act 2005: Statutory Duties to Accommodate

