

THE MENTAL CAPACITY ACT 2005

Attorneys must follow the principles of the Mental Capacity Act 2005, the principal aims of which are to protect people who lack mental capacity and to help them take part as much as possible in decisions that affect them.

The aim is to assist and support people who may lack mental capacity, to make particular decisions and not to restrict or control their lives.

THE FIVE STATUTORY PRINCIPLES ARE:

- 1 A person must be assumed to have capacity unless it is established that they lack capacity.
- 2 A person is not treated as unable to make a decision unless all practical steps to help him or her to do so have been taken without success.
- 3 A person is not to be treated as unable to make a decision merely because he or she makes an unwise decision.
- 4 An act or decision made under the Lasting Power of Attorney for or on behalf of a person who lacks mental capacity must be done or made in his or her best interests.
- 5 Before the act is done or the 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.

Making a Lasting Power of Attorney

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WHY MAKE A LASTING POWER OF ATTORNEY?

We all understand about making a Will and how this deals with our assets after we die. But it is also very important to care about keeping your assets and yourself safe during your lifetime if you are unable to deal with your finances and personal welfare. You may be involved in a serious accident which permanently incapacitates you or you may suffer a physical illness and be confined to bed or hospital or you may become mentally incapacitated as a result of old age or illness.

A person can only make a Lasting Power of Attorney whilst they still have the mental ability to understand the legal process. If you leave it too late the only way your financial affairs can be managed is by way of an application to the Court of Protection for a Deputyship Order which is more complicated, time consuming and expensive than making a Lasting Power of Attorney.

BENEFITS OF MAKING A LASTING POWER OF ATTORNEY:

- 1 You can choose the person or persons that you trust to act on your behalf knowing that they will treat you well and do as you would do.
- 2 You can choose the person or persons you trust to deal with your financial affairs if you have to go abroad or away from home for a period of time.
- 3 You can choose the person or persons you wish to make decisions on your behalf relating to your living accommodation and care, medical treatment and even day to day matters such as what you eat and who visits you.
- 4 You can choose the person or persons who would make decisions on your behalf in the event that you no longer have mental capacity, decisions such as the selling of your house and other assets, claiming benefits on your behalf, operating your bank accounts and dealing with your tax affairs.

LASTING POWERS OF ATTORNEY

A Lasting Power of Attorney is a legal document where a person (the Donor) gives another person or persons (the Attorney(s)) the authority to make decisions on their behalf. The document must be made in a prescribed form and certified by a person who confirms that the Donor understands the nature and effect of the Lasting Power of Attorney and that they were not under any pressure to make it. A Lasting Power of Attorney can only be used after it has been registered with the Office of the Public Guardian.

There are two types of Lasting Power of Attorney:

■ PROPERTY AND AFFAIRS LASTING POWER OF ATTORNEY

which allows the Attorney(s) to make decisions and manage property and financial affairs on the Donor's behalf. This type of Lasting Power of Attorney can be used both before and after the onset of mental incapacity.

■ HEALTH AND WELFARE LASTING POWER OF ATTORNEY

which allows the Attorney(s) to make decisions on the Donor's behalf regarding their personal healthcare and welfare and if the Donor wishes, it can include the power to make decisions about life sustaining treatment.

This type of Lasting Power of Attorney can only be used after the onset of mental incapacity.

One of the most important decisions to be made when making a Lasting Power of Attorney is who will be appointed as the Attorney(s). It is a very important role and the Attorney(s) must be made aware of the serious nature of the task they are being asked to undertake. The Attorney(s) must be trustworthy and possess the necessary abilities to carry out their duties. If more than one Attorney(s) is appointed they can be appointed to act "together" or "together and independently". A replacement Attorney can also be appointed if the first appointed Attorney(s) die or are unable to act for you. Your Attorneys must follow the principles set out in the Mental Capacity Act 2005 when they are making decisions and acting on your behalf, a simplified explanation of the same is shown overleaf.

EXISTING ENDURING POWERS OF ATTORNEY

Any Enduring Power of Attorney remains valid whether or not it has been registered at the Office of the Public Guardian, provided that all parties to the document signed the same prior to the 1st October 2007. Enduring Powers of Attorney only give the Attorney(s) the authority to deal with financial affairs and property.

HOW DO I MAKE A LASTING POWER OF ATTORNEY?

At Bates Wells and Braithwaite we have many years of experience in the preparation of Powers of Attorney and we can assist and advise you in the preparation of the same and thereafter arranging registration of the documents at the Office of the Public Guardian.