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## **Due care and attention**

**The Mental Capacity Act 2005 (“the Act”) came into force on 1st October 2007 and the changes included the new Lasting Power of Attorney (LPA) Health and Welfare. Before the Act it was not possible to appoint an attorney to make welfare decisions. Therefore it was expected that these new LPAs would prove popular, as an individual could now choose who they wanted to be making their welfare decisions in the event they have become mentally incapable of making these decisions themselves. As at the end of 2010, the Office of the Public Guardian had registered 38,000 Health and Welfare LPAs. This compares with a figure of 210,000 for the registration of Enduring Powers of Attorney and Lasting Powers of Attorney Property and Financial Affairs.**

Everyone may recall the story of Mrs Figg, which was widely reported in the press. Mrs Figg’s daughter decided to move her mother out of a care home to live with her, as she was concerned that her mother was not being properly looked after. Mrs Figg was very quickly removed from her daughter’s home by the police after an emergency warrant was granted at the request of Social Services, as they were of the view that it was in Mrs Figg’s best interests to return to the care home. Following further meetings with the family to discuss Mrs Figg’s care needs, Social Services agreed for Mrs Figg to move back in with her daughter once the necessary adaptations to the house had been carried out and the daughter had undergone a carers training course with professional carers also being involved in providing the care. All this upheaval may have been avoided if Mrs Figg had made a Health and Welfare LPA appointing her family as her attorney(s) to make her welfare decisions for her, as social services would not have had the authority to make this decision. Most people would prefer their family to be making the decision as to where they should live or what care they should receive in the event that they are mentally incapable of making this decision for themselves.

If no Health and Welfare LPA has been created then welfare decisions will be made by social services, carers or medical professionals, acting in what they believe to be the persons' best interests. They will have a duty to consult with the next of kin but the decision is ultimately theirs. Where the next of kin do not agree with the decision being made then there is firstly the option of asking for a best interests meeting to discuss the matter further and try to come to an agreement. Often this will involve asking a more senior person to be involved in the meeting in order to review the decision. If a decision still cannot be made or the next of kin still don't agree with the decision, the matter can be referred to be determined by the Court of Protection. Urgent welfare issues where an immediate decision is required can be dealt with by the Court within 24 hours or on the same day. This includes applications about urgent medical treatment and applications to prevent someone being removed from the place where they live. The application would include having to pay the normal Court of Protection application fee and if applicable a hearing fee.

Technically an application can be made to the Court of Protection for a Health and Welfare Deputy to be appointed to enable the Deputy to be authorised to make all the welfare decisions. In practice the Court has been unwilling to make such an appointment and has rejected many of these applications. Instead the Court has preferred to deal with specific issues as they arise in the event that they cannot be resolved without the Court's input. It is therefore important to ensure that a Health and Welfare LPA is created where an individual wishes their family or specific individuals to be making these decisions for them as opposed to social services, carers or medical professionals. The main issue that most people will associate with is the worry of moving into a care home or receiving care at home. They will have often discussed their wishes with their family so that these are known in the event that they do lose their mental capacity to make the decision. Unless they have made a Health and Welfare LPA authorising their family to make these decisions, then their family will only be consulted by social services and will not be able to make the final decision.

To create an LPA the prescribed form needs to be used. The main elements to complete and consider are:

- The details of the attorneys and how they are to be appointed - if more than one attorney is appointed they can be appointed to act jointly and severally or jointly. They can also be appointed to act jointly in relation to some decisions and jointly and severally in relation to others. The practical issue here is that if one of the attorneys became unable to act in the future then the decisions which require the attorneys to act jointly could no longer be made under the LPA. There is also the option of appointing replacement attorneys.
- Life-Sustaining Treatment Decisions - the form requires the donor to sign in either the “Option A” box to give their attorneys the authority or the “Option B” box to confirm that they are not giving their attorneys the authority to make such decisions. LPAs cannot give attorneys the power to demand specific forms of medical treatment that healthcare staff does not believe to be necessary or appropriate. If agreement cannot be reached with the attorney, the health-care professional can apply to the Court of Protection for a final decision. While the Court is considering the matter, life-sustaining treatment can be given to prolong the donor’s life or to prevent their condition worsening.
- Restrictions - if there are no restrictions in a Health and Welfare LPA then the attorneys will have the authority to make decisions in relation to all aspects of the donor’s personal welfare (for example, where to live, their diet and who to have contact with) and medical and healthcare treatment. Restrictions can be included to limit or control the attorneys’ authority, for example that the donor only wishes the attorneys to make decisions about social care and not healthcare.
- The donor needs to name at least one or more individuals (not more than 5) to be notified of an application to register the LPA. If the donor does not name anyone then a second Certificate (see below) will need to be provided.
- Certificate Providers Statement – this statement confirms the donor’s capacity to create the LPA. This can either be completed by someone who has known the donor for at least two years or someone who has the relevant professional skills (for example a GP or a Solicitor).
- Registration – to enable the LPA to be used it needs to be registered with the Office of the Public Guardian. There are prescribed forms for the registration application and the notices which need to be forwarded to the named persons. The registration fee is currently £120 subject to exemptions and remissions based on the donor’s income. The registration process

is currently taking up to 10 weeks so it is often advisable to register the LPA sooner rather than later. In some circumstances the welfare decision cannot wait 10 weeks.

Attorneys can only act under the Health and Welfare LPA if the donor is mentally incapable of making the specific welfare decision and they have a duty to act in accordance with the principles set out in the Act. The main principle is that acts done or decisions made must be in the individual's best interests. There is no definition of best interests but the Act does set out a checklist of factors to be considered.

It is important to ensure that clients are aware of the implications of a Health and Welfare LPA so that they can decide who they want to be making their welfare decisions in the event they become mentally incapable. Some clients are happy to leave the decision in the hands of an independent third party. However, many would prefer their family, who would be more aware of their wishes and beliefs, to make these decisions.

**If you would like to talk to us about the issues raised by this note, please contact:**

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