

Capacity to make Lasting Power of Attorney



In England and Wales the law in relation to adults who lack the capacity to make decisions on their own behalf is laid down in the Mental Capacity Act 2005 ('MCA'), which is supported by the Code of Practice ('the Code').

The five statutory principles as set out in the MCA, Section 1 are:

- + A person must be assumed to have capacity unless it is established that they lack capacity
- + A person is not to be treated as unable to make a decision unless all practicable steps to help them to do so have been taken without success
- + A person is not to be treated as unable to make a decision merely because they make an unwise decision
- + An act taken, or decision made, under this Act for or on behalf of a person who lacks capacity must be taken, or made, in their best interests
- + Before the act is taken, or the decision is made, regard must be given 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.

The Code sets out a list of questions that should be asked before carrying out an assessment of capacity:

- + Does the person have all the relevant information they need to make the decision?
- + If they are making a decision that involves choosing between alternatives, do they have information on all the different options?
- + Would the person have a better understanding if information was explained or presented in another way?
- + Are there times of the day when the person's understanding is better?
- + Are there locations where they may feel more at ease?

- + Can the decision be put off until circumstances are different and the person concerned may be able to make a decision?
- + Can anyone else help the person to make choices or express a view (for example a family member, carer or someone to help with communication)?

The definition of mental capacity:

Capacity refers to the ability that a person possesses to make specific decisions or to take actions that influence their life, ranging from a simple decision about what to have for breakfast, to far-reaching decisions about investments or serious medical treatment.

Capacity is decision-specific and time-specific and the inability to make the decision in question must be because of an impairment of, or a disturbance in, the functioning of the mind or brain.

It is essential that an assessment of mental capacity be based on the individual's ability to make a specific decision at the time it needs to be made, and not their ability to make decisions in general.

The Test for Capacity in the MCA imposes a test of capacity with two parts:

- + Does the individual have an impairment of, or disturbance in, the functioning of their mind or brain (for example, a disability, condition or trauma that affects the way their mind or brain works)? If so
- + Does the impairment or disturbance cause the person to be unable to make a specific decision at the time it needs to be made? The impairment or disturbance does not need to be permanent, and can include conditions such as forms of mental illness, dementia, long-term side effects of brain injury and symptoms of alcohol or drug use.

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Four factors must be considered when deciding whether or not a person is incapable of making a decision:

- + **Does the person understand the information relevant to the decision to be made?**
E.g. information about the foreseeable consequences resulting from the decision.
- + **Can the person retain that information in their mind?**
Even if retention of information for a short time may be adequate for some decisions.
- + **Can the person use or weigh that information as part of the decision making process?**
The focus should be on the process not the decision.
- + **Can the person communicate the decision?**
(whether by talking/using sign language or other means).

If an impairment or disturbance in the person's mind or brain is causing them to be unable to do any of the four things above, then they do not have capacity to make the decision in question.

Further information

For advice and guidance on LPA, contact our specialist Wills, Trusts and Probate team on **0117 325 2929** or visit barcankirby.co.uk.

BEDMINSTER 25 North St, Bristol BS3 1EN
BISHOPSTON 60 Gloucester Rd, Bristol BS7 8BH
BRISTOL CITY CENTRE Prince House, Bristol BS1 4PS

KINGSWOOD 111/117 Regent St, Bristol BS15 8LJ
THORNBURY 36 High St, Thornbury BS35 2AJ

Barcan+Kirby

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