



## Consent and decision-making: Financial matters for people with a learning disability aged 18 or over

---

***This factsheet gives an overview of consent and decision making for adults with a learning disability in relation to financial issues.***

*What is mental capacity?*

*What does the Mental Capacity Act 2005 say about consent and making decisions on behalf of an adult with a learning disability?*

*What happens for financial decisions?*

*What about bank accounts?*

*What about mortgages and tenancies?*

*What about wills?*

*What about making financial decisions on behalf of a person with a learning disability?*

*Court of Protection*

*Appointeeships*

*Powers of Attorney*

*What decisions can an Attorney make?*

---

### ***What is mental capacity?***

When it comes to making decisions every adult has the right to choose what they want. They can make their own decisions, for example, about health, legal or financial issues. It will be taken for granted that they have the mental capacity to do so unless it can be proved that they cannot. Some people will be unable to make these decisions. Some people who may not be able to use speech may suggest by their behaviour if they are happy or not about a decision. People who do lack mental capacity and are not able to make decisions for themselves may need to have decisions made for them. There is currently no legal definition of **capacity** however the Code of Practice to the Mental Capacity Act 2005 describes mental

capacity as “the ability to make a decision”.

***What does the Mental Capacity Act 2005 say about consent and making decisions on behalf of an adult with a learning disability?***

The Mental Capacity Act 2005 provides the legal framework which allows people to act and make decisions on behalf of individuals who lack the mental capacity to make particular decisions for themselves.

Everyone working with and/or caring for an adult (aged 16 or over) who may lack **capacity** to make specific decisions must comply with the act. The same rules apply whether the decisions are life-changing events or everyday matters. There are five main beliefs behind the act:

- Everyone is believed to have capacity to make decisions unless it can be proved that they do not.
- All appropriate help and support must be given to a person to help them make a decision before it is decided that they are unable to.
- A person should not be treated as unable to make a decision just because the decision they make is unwise or unusual.
- Any act or decision made on behalf of someone who lacks capacity must be done or made in their best interests.
- Before any act or decision is made regard must be given as to whether it could be achieved any other way which maintains their basic rights and freedom of action.

People with a learning disability who are aged 18 or over have the same legal rights and freedoms as any other adult. No one has a formal legal right to make decisions on behalf of a person with a learning disability who is aged 18 or over.

Relatives do not have any legal right to make decisions on behalf of their adult relatives with a learning disability. Relatives cannot become the legal guardian of an adult with a learning disability. A term such as "guardian" carries no legal meaning in respect of adults with a learning disability - except in very limited circumstances under sections 7-10 of the

Mental Health Act 1983.

There are two main exceptions where the law allows another adult to make a decision on behalf of an adult with a learning disability.

These are:

- Medical treatment: A health professional can give medical treatment to an adult with a learning disability who is unable to consent, if the treatment is judged to be in the person's best interests.
- Financial issues: A responsible adult can seek approval as an **appointee** to look after the social security benefits of someone unable to do this for themselves. They can seek the approval of the Court of Protection to act as a **Deputy**, to take control of the finances of an adult with a learning disability who is not able to look after their own financial affairs even with support (see later).

Most adults with a learning disability are capable of making their own decisions, particularly when clear, accessible information is provided. It is important that adults with a learning disability are encouraged to make their own decisions with whatever support they need.

However, some adults with a learning disability do not have the mental capacity to make certain decisions. This is a legal test. Those who step in to make decisions for them should respect their best interests, and encourage them to make the decisions they can make. Someone unable to make major decisions or assess risks reliably may be able to exercise choice in what they wear or eat. There is nothing in law that gives relatives formal decision-making rights, unless they have the financial powers mentioned above and further explained below.

### ***What happens for financial decisions?***

Money matters can be difficult for many of us. They may be more difficult for people with a learning disability. However, many people with a learning disability may be competent to draw weekly benefits or receive earnings, take responsibility (with help where necessary) for personal spending and make a

valid will. They live full and independent lives in the community, making their own choices with varying levels of support. They may handle their current and saving accounts.

Money is a key factor in a person's self-determination, giving the individual an opportunity for choice and control. Many simple contracts should be open to people with a learning disability including payment of goods in a shop, or booking a holiday. The Disability Discrimination Act reinforces this right.

### ***What about bank accounts?***

A person with a learning disability has the same right to open a bank account as the rest of the population, which means they are subject to the same obligations. A customer with a learning disability must be capable of entering into a legally enforceable agreement and give informed consent to transactions such as opening a bank account. For card based accounts, customers need to understand the use of cash points and have the ability to remember a PIN number and to keep it secret. They need to understand the security consequences of failing to do so. If there are difficulties, they can sometimes be solved by explaining a bank account in very clear terms to a person with a learning disability and offering a simple account. If the person does not have the **capacity** to have their own account, they are not able to open a bank account. Instead, a family member will have to operate one in their own name on the behalf of a person with a learning disability, and declare that they are holding the account "on trust".

### ***What about mortgages and tenancies?***

People with a learning disability live in a variety of different accommodation types. Some people live in shared homes and others alone. The issue of **capacity** arises in taking a tenancy, buying a property or taking out a mortgage. To make a contract a person will need to:

- understand the nature of the contract
- want to enter into a contract; and
- understand the obligations of the contract, (for example in the case of rented housing that they will have to pay money regularly).

Home ownership is an increasingly possible option. People with a learning disability can take out a tenancy or buy a property outright or take out a mortgage. They will need to understand the contract they are entering into.

### ***What about wills?***

A person with a learning disability can make a valid will if they have the mental capacity to do so. The **capacity** required is a legal test and is based on the ability to understand the concept of passing things over to others when they die, what they are leaving and to whom. If the person with a learning disability has the capacity to make a will, a solicitor should be involved in agreeing their mental capacity and in making their will.

If however, the person does not have the capacity to make a will, an application can be made to the Court of Protection for a statutory will to be made on their behalf. However the Court will only get involved if the person has sizeable assets or owns a property. If a person with a learning disability does not make a will, the laws of **intestacy** will apply to their estate on their death. This will mean that their estate will pass to their next of kin, in the order of their husband/wife, children, parents, siblings (or their children), grandparents and lastly aunts and uncles (or their children). There are certain rules as to what extent each class of family can benefit, and also members of family of the half blood can benefit. If there is no-one in the above categories to benefit, their entire estate will pass to the Crown.

### ***What about making financial decisions on behalf of a person with a learning disability?***

There are a number of situations in which it may be necessary to take over the management of someone else's money. It is important that control is never taken away from people against their wishes if they are still able to manage for themselves.

In trying to identify when people no longer have the **capacity** to manage their own financial affairs, it should be assumed they have capacity unless it can be proved otherwise. Focus should be on the actual ability to understand and to function in making

particular decisions; for example, can they go shopping? Can they pay their bills? Do they know what income they have?

A person is unable to make a decision

- if at the time when the decision is made the person is unable to understand or retain information relevant to the decision; or
- unable to make a decision based on that information.

A carer may have a friend or family member who cannot manage their own financial affairs and may be concerned about what action should be taken to protect the vulnerable person's money and property. There are a number of ways of administering the financial affairs of those who are not able to do so themselves. A person could act as an **appointee** with the Department for Work and Pensions and have responsibility for everything in relation to social security benefits. In some instances, a person could be registered as having **Power of Attorney** with the Public Guardianship Office or be appointed as a **Deputy** by the Court of Protection to manage their affairs.

### ***Court of Protection***

An application may be made to the Court of Protection for a **Deputy** to be appointed for a person who does not have the mental **capacity** to deal with his or her own money and property, and does not have the capacity to make a **Power of Attorney** (see below). A Deputy may be a friend or paid professional or an official appointed by the Court. The Court selects the Deputy by considering the "patient's" wishes, the nature or complexity of the person's financial affairs, whether a family member or carer could be appointed as a Deputy, and the person's best interests.

A Deputy handles collecting pensions and income, paying bills, and looking after the "patient's" property. The Deputy must get the Court's approval for spending large amounts of money or unusual expenses or gifts. The Deputy must submit annual accounts to the Court. Deputies are paid for their expenses; and a professional may charge for their services. There are considerable charges involved

with a Deputy application and once appointed, an annual administration fee and transaction fees are also paid to the Trust Division of the Public Guardian Office for their services.

To apply to the Court of Protection to be a Deputy, you should contact the Receivership Division of the Public Guardian Office.

In Northern Ireland the situation is similar. If you become incapable of managing your own affairs your attorney(s) will have to apply to the High Court (Office of Care and Protection) for registration of this power. You will receive notification of the attorney's application to the court. The court may question the attorney's handling of your affairs and may cancel their power at any time if it is not satisfied that the attorney is acting in your best interests. If someone has to apply to the court on a person's behalf, they are known as a "controller".

### ***Short Orders from the Court of Protection***

Short orders usually deal with smaller sums of money or one-off situations. An applicant is appointed on a one-off basis to deal with a financial situation that has arisen: for instance, to pay bills or receive money into someone's bank account, or receive money on behalf of someone who does not have the mental capacity to have their own account, such as an inheritance. An applicant can be a relative in the same way as a Deputy from the Court of Protection. Each time an applicant is appointed for a short order a cost will be involved.

### ***Appointeeships***

An **appointee** is a named person who acts on behalf of another person in relation to claims for and payments of social security benefits. An appointee has to apply to the Department for Work and Pensions for appointment and this usually requires medical evidence that a person with a disability is unable to manage their own affairs. Appointeeships are only appropriate when someone is unable to look after their own affairs, because of disability. If it is only a question of difficulty in picking up their payments, alternative arrangements can be made. (An agent can be appointed to collect the benefits on the beneficiary's behalf. Direct payments into a bank

account and banking arrangements with the post office mean other arrangements are increasingly rare.)

The appointee does not have to be a relative or carer, or live with the person with a disability. They are responsible for everything relating to a person's benefits. For example, they are responsible for claiming benefits in good time and for reporting changes that could affect benefit entitlement.

If someone is living in residential care, the provider should make sure there is an appropriate appointee. If a parent is the appointee and bills are not being paid, or the son or daughter is regularly without spending money, the appointeeship can be challenged and can be withdrawn.

It should be noted that it is common for residential care providers to want to manage the funds themselves. Some have had bad experiences of relatives being reluctant to spend the money, and of the person with a disability always being short of both money and goods. However, some parents wish to maintain a stake in the life of their son or daughter who cannot manage their own money, and there is no legal restriction to them doing so.

If someone suspects that the appointee is not using the person's benefits in the person with a disability's best interests, they can challenge the appointeeship by informing the Department for Work and Pensions of their concerns.

### ***Powers of Attorney***

A ***Power of Attorney*** is never an option for someone who has never had mental ***capacity***. A Power of Attorney allows a person with a learning disability to choose a person to assume control of his or her financial and property affairs for reasons of convenience, such as going abroad. This does not enable someone to give consent on that person's behalf for medical or welfare matters. It enables the attorney to enter into legal commitments on behalf of that person in certain situations.

The person appointing a Power of Attorney needs to be capable of understanding the meaning and nature

of the powers their attorney would have over their financial and property affairs.

### ***Types of attorney***

There are two types of attorney. An individual may appoint someone under an Ordinary Power of Attorney. This can be general (relate to all donor's property) or specific, only in relation to one property. It is automatically revoked by law when the donor loses the mental capacity to manage and administer his/her property affairs.

The Mental Capacity Act 2005 introduced a new type of power of attorney when it came into effect in October 2007. This new type of attorney is called a Lasting Power of Attorney ("LPA") and replaced the Enduring Power of Attorney. A Lasting Power of Attorney still does all the same functions as an Enduring Power of Attorney but allows decisions about personal, healthcare and welfare issues to be made in addition to financial decisions. The **LPA** is in 2 forms – personal and welfare, and property and affairs.

### ***What decisions can an Attorney make?***

#### ***Personal Welfare (including healthcare and medical treatment):***

A standard personal welfare **LPA** allows attorneys to make decisions about anything that relates to the donor's personal welfare. Donors can however add restrictions or conditions to areas where they do not wish the attorney to have power to act. However the personal welfare LPA only comes into effect when the donor lacks **capacity** to make these decisions.

Examples of decisions that can be made:

- Where a person should live and who they should live with
- Day to day care, diet and dress
- Who they have contact with
- Agreeing to or refusing medical examination and treatment
- Arrangements that need to be made for the donor to be given medical, dental or optical treatment.
- Assessments for and provision of community care services

- Whether the donor should take part in social and leisure activities, education or training.
- The donor's personal correspondence and papers
- Rights to access to personal information about the donor
- Complaints about the donor's care or treatment

***Property and Affairs:***

A donor can make an LPA giving an attorney the right to make decisions about property and financial affairs. Unless the donor states otherwise once the LPA is registered, the attorney can make all decisions relating to these areas even if the donor still has capacity to make decisions.

If the donor decides it should only come into effect when they lose capacity it is up to the donor to state how their capacity should then be assessed. They may be happy for the attorney to carry out the assessment or they might say it has to be done by their GP.

If the donor has not restricted the decisions then the attorney can decide on any or all of the person's property or financial affairs e.g.:

- Buying or selling property
- Opening, operating or closing a bank or other account
- Giving access to financial information
- Claiming, receiving and using all benefits and other income
- Dealing with tax affairs
- Paying rent and household expenses
- Investing savings
- Making limited gifts on behalf of the donor
- Paying care and nursing home expenses
- Buying equipment or other help needed

***Key terms:***

**1. Appointee** - this is a named person who acts on behalf of another person in relation to claims for and payments of social security. They are responsible for everything relating to that person's benefits.

**2. Power of Attorney** - this allows a person to choose someone to assume control of their financial and property affairs for reasons of convenience. They

must have mental capacity at the time they appoint someone.

**3. Deputy** - this person handles collecting pensions and income, paying bills and looking after a person's property if they are not able to do it themselves. A Deputy is appointed by the Court of Protection.

**4. Intestacy** - if you die without making a will, the law declares intestacy and decides how your assets will be distributed regardless of your wishes.

**5. Capacity** - the ability to make an informed decision based on understanding the situation and the consequences.

**6. LPA** - Lasting Power of Attorney

***This document was approved by Aarti Puri (Mencap Solicitor) on 11/03/2008***