

<b>Reference Number:</b> UHB 113 <b>Version Number:</b> 2	<b>Date of Next Review:</b> 29 <sup>th</sup> Nov 2020 <b>Previous Trust/LHB Reference Number:</b>
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## LASTING POWER OF ATTORNEY AND COURT APPOINTED DEPUTY PROCEDURE (MENTAL CAPACITY ACT 2005)

### Introduction and Aim

The aim of this procedure is to provide information and direction to Cardiff and Vale UHB staff regarding Lasting Powers of Attorney (LPA), Enduring Powers of Attorney (EPA) and Court Appointed Deputies (CADs), so that UHB staff know how to respond appropriately and lawfully when a patient who has an attorney or deputy presents for treatment and care.

The procedure provides further information and detail in support of section 12 (Patients who lack capacity to give or withhold consent) of the UHB's Consent to Examination or Treatment Policy.

The Mental Capacity Act 2005 (MCA) makes provision for a person's decision-making authority with regard to property and affairs, and health and welfare to be vested in another person, either by way of a Lasting Power of Attorney (LPA) or by the appointment of a Court appointed deputy (CAD).

### Objectives

- Adherence to this procedure means that health professionals will be acting lawfully.

### Scope

This procedure applies to all of our staff in all locations, including those with honorary contracts.

### Equality Health Impact Assessment

An Equality and Health Impact Assessment (EHIA) has not been completed, as this procedure has been developed in support of the Consent to Examination or Treatment Policy.

### Documents to read alongside this Procedure

[Department for Constitutional Affairs \(2007\) Mental Capacity Act Code of Practice, TSO, London](#)

[HMSO \(2005\) Mental Capacity Act 2005, TSO, London](#)

[Cardiff and Vale UHB Consent to Examination or Treatment Policy](#)

### Approved by

Mental Health and Capacity Legislation Committee

<b>Accountable Executive</b>	Medical Director
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<b>or Clinical Board Director</b>	
<b>Author(s)</b>	Mental Capacity Act Manager
<p><b>Disclaimer</b></p> <p><b>If the review date of this document has passed please ensure that the version you are using is the most up to date either by contacting the document author or the <a href="#">Governance Directorate</a>.</b></p>	

<b>Summary of reviews/amendments</b>			
<b>Version Number</b>	<b>Date of Review Approved</b>	<b>Date Published</b>	<b>Summary of Amendments</b>
2	29/11/17	13/12/17	Revised document. Minor amendments including <ul style="list-style-type: none"> <li>• Use of current UHB template</li> <li>• Links to examples of registered LPA and CAD documents added</li> <li>• Link to search the register of LPAs and CADs added</li> <li>• Weblinks checked</li> </ul> References to other documents checked and amended where necessary

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## 1. DEFINITIONS

**Enduring Power of Attorney (EPA):-** An EPA is a legal document that deals with property and affairs – they do not cover health and welfare (see section 10).

**Lasting Power of Attorney (LPA):-** A LPA is a legal document that allows a person to appoint another person/persons (the attorney or donee) to make decisions that are as valid as one made by the person (the donor) (see section 11). LPAs cover either property and affairs or health and welfare.

**Court Appointed Deputy (CAD):-** The Court of Protection can appoint a person (a deputy) to take decisions about property, affairs, health and social care on behalf of a person who lacks mental capacity to take these decisions (see section 12).

## 2. RESPONSIBILITIES

Executive responsibility for this procedure lies with the Medical Director.

Clinical Board Directors are responsible for ensuring that staff are aware of this procedure, how to access it and what to do if they have queries about it.

All staff who have contact with patients in the course of providing them with all aspects of treatment and care (including research) have a responsibility to familiarise themselves with, and follow the content of this procedure and to ensure that they remain up to date with regard to relevant legislation, case law and guidance regarding LPAs, EPAs and CADs.

The most senior health professional involved with the patient's care has specific responsibilities for working with attorneys and deputies – see section 13.

The Mental Capacity Act Manager is responsible for ensuring that this procedure is updated as necessary; that relevant training is available; and to provide information, support and training to UHB staff as required.

NOTE: Where staff are unsure about the legal aspects of LPAs, EPAs and CADs in a particular case, they must seek advice from the Mental Capacity Act Manager/Patient Safety Team in the first instance. If this does not resolve the matter and legal advice is needed, staff must contact the Director of Governance/Board Secretary in order to arrange this. Please see Appendix A for contact details.

## 3. RESOURCES

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No extra resources are required to implement this procedure.

#### **4. TRAINING**

Specific training is not required for this procedure. However, the Mental Capacity Act Manager can provide training on this procedure, or as part of more general Mental Capacity Act training, if required.

#### **5. IMPLEMENTATION**

Clinical Board Directors are responsible for ensuring that staff who work within their Clinical Boards implement this procedure. The Mental Capacity Act Manager will provide support as required.

#### **6. ENDURING POWER OF ATTORNEY (EPA)**

An EPA is a document appointing a person (an ‘attorney’) to manage the property and financial affairs of another person (the ‘donor’).

If the donor becomes unable to make financial decisions, the EPA must be registered before it can be used.

New EPAs can no longer be created. However if a person made a EPA before October 2007, it can still continue to be used.

EPAs deal with property and affairs – they do not cover health and welfare.

Attorneys of EPAs must consider the Mental Capacity Act and its Code of Practice when acting on behalf of the donor.

Examples of registered EPAs can be found here -

<https://www.gov.uk/government/publications/enduring-power-of-attorney-valid-example>

#### **7. LASTING POWER OF ATTORNEY (LPA)**

A person who is aged 18 years and over and who has mental capacity to do so may make a LPA.

A LPA is a legal document that allows a person to appoint another person/persons (the attorney or donee) to make decisions that are as valid as those made by the person (the donor).

There are two types of lasting power of attorney –

- Property and affairs (money and property)

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- Health and welfare (healthcare, including consent to examination or treatment, and social care)

The donor can appoint more than one attorney. The attorneys can be appointed to act

- jointly (must always act together), or
- jointly and severally (attorneys may either act together or independently), or
- jointly in respect of some specified decisions, but severally otherwise

An attorney for a property and affairs LPA does not have authority to make health and welfare decisions (unless they are also an attorney for a health and welfare LPA). A health and welfare attorney does not have authority for property and affairs, unless they have also been appointed as a property and affairs attorney.

An LPA does not come into effect until it has been registered and stamped on each page by the Office of Public Guardian.

Attorneys of LPAs must have regard to the MCA Code of Practice and act in the person's best interests.

If it is suspected that an LPA exists but evidence cannot be gained to substantiate this, an enquiry can be made to the Office of the Public Guardian for a search of the register of attorneys -

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/286541/OPG100\\_Apply\\_to\\_search\\_PG\\_registers.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/286541/OPG100_Apply_to_search_PG_registers.pdf)

This is a free service.

## **7.1 Property and affairs LPA**

Unless the donor states otherwise, once the LPA is registered, the attorney has authority to make all decisions about the donor's property and affairs even if the donor still has capacity to make the decisions for him/herself.

The attorney should allow and encourage the donor to do as much as possible for him/herself, and should only act when the donor asks them to, or when the donor loses capacity to make the decisions. If UHB staff have concerns that an attorney is acting inappropriately, they should discuss the matter with the Mental Capacity Act Manager. It may be necessary to contact the Office of the Public Guardian for advice and also notify the UHB's Safeguarding Adults Team.

The donor may, however, wish to hand over responsibility for all decisions to the attorney, even those he/she still has capacity to make.

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## 7.2 Health and welfare LPA

LPAs can be used to appoint attorneys to make decisions about health and welfare, which can include healthcare, including medical treatment decisions and social care. Donors can add restrictions or conditions to areas where they do not give attorneys the power to act. For example, a donor might only want an attorney to make decisions about their social care and not their healthcare.

There are particular rules for LPAs authorising an attorney to make decisions about life-sustaining treatment (see section 7.4).

A health and welfare LPA can only be used at a time when the donor lacks capacity to make a specific decision.

When health professionals are proposing medical treatment and care or are preparing a care plan for a patient who has appointed a health and welfare attorney, they must first assess whether the donor has capacity to agree to the treatment or care plan or to parts of it. If the donor lacks mental capacity to give or withhold consent, health professionals must then consult the attorney and obtain their consent.

If a decision is needed about a health and welfare matter for which the attorney does not have authority to decide and a best interests decision needs to be made, the attorney must still be consulted, if practical and appropriate, about what they consider to be in the patient's best interests.

## 7.3 Restrictions on the powers of health and welfare attorneys

Attorneys do not have the right to consent to or refuse treatment in situations where:

- **the donor has capacity to make the particular healthcare decision**  
An attorney has no decision-making power if the donor can make their own treatment decisions.
- **the donor has made an advance decision to refuse the proposed treatment**  
An attorney cannot consent to treatment if the donor has made a valid and applicable advance decision to refuse a specific treatment. But if the donor made an LPA after they had made an advance decision, and gave the attorney the right to consent to or refuse the treatment specified in the advance decision, the advance decision will no longer be valid and applicable. For more information about advance decisions, please refer to section 11.8 of the UHB's Consent to Examination or Treatment Policy.
- **a decision relates to life-sustaining treatment**

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An attorney has no power to consent to or refuse life-sustaining treatment, unless the LPA document explicitly authorises this

- **the donor is detained under the Mental Health Act**

An attorney cannot consent to or refuse treatment for a mental disorder for a patient detained under the Mental Health Act (MHA) 1983, except in the case of Electro-convulsive therapy (ECT), where the attorney may refuse consent. However, if the ECT is to be given to the patient under MHA, Section 62 (urgent treatment) the attorney has no authority to refuse.

LPAs cannot give attorneys the power to demand specific forms of medical treatment that healthcare professionals do not believe are necessary or appropriate for the donor's particular condition.

Attorneys must always follow the MCA and make decisions in the donor's best interests. If health professionals disagree with the attorney's assessment of best interests, they should discuss the case with other health professionals and/or get a formal second opinion. They should then discuss the matter further with the attorney. If they cannot settle the disagreement, they must seek legal advice. This will be arranged via the appropriate advisor within the UHB (See Appendix A). An application to the Court of Protection may be necessary.

#### **7.4 Health and welfare LPA that authorises an attorney to make decisions about life-sustaining treatment**

An attorney can only consent to or refuse life-sustaining treatment on behalf of the donor if the LPA explicitly grants this authority to the attorney.

The attorney must not be motivated by the desire to bring about the donor's death.

If there is doubt that the attorney is acting in the donor's best interests, an application can be made to the Court of Protection for a decision. While the court is coming to a decision, healthcare professionals can give life-sustaining treatment to prolong the donor's life or stop their condition getting worse.

### **8. COURT APPOINTED DEPUTY**

The Court of Protection can appoint a person (a deputy) to take decisions about property, affairs, health and social care on behalf of a person who lacks mental capacity to take these decisions.

Deputies, like attorneys, must have regard to the MCA Code of Practice and act in the person's best interests.

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Deputies cannot refuse consent for life-sustaining treatment.

If a decision is needed about a health and welfare matter for which the deputy does not have authority to decide and a best interests decision needs to be made, the deputy must still be consulted, where practical and appropriate, about what he/she considers to be the patient's best interests.

If health professionals feel that a deputy is not acting the best interests of the patient, and they have not been able to resolve the matter with the deputy, they should contact the Office of the Public Guardian (see section 11. below).

If it is suspected that a deputyship order exists but evidence cannot be gained to substantiate this, an enquiry can be made to the Office of the Public Guardian for a search of the register –

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/286541/OPG100\\_Apply\\_to\\_search\\_PG\\_registers.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/286541/OPG100_Apply_to_search_PG_registers.pdf)

### **8.1 Restrictions on the powers of Court Appointed Deputies**

Restrictions on a Court Appointed Deputy (CAD) include –

- The CAD believes, or has reasonable grounds for believing, that the person has capacity to take the decision in question
- The CAD cannot prohibit a named person from having contact with the person with impaired capacity, nor can the CAD direct the person's responsible healthcare professional to allow a different responsible healthcare professional to take over that responsibility
- The CAD cannot overturn a decision made by an attorney acting under an LPA granted by the person before they lost capacity
- The CAD cannot refuse the provision or continuation of life-sustaining treatment for a person who lacks capacity to consent to it (only the Court can take this decision)

## **9. WORKING WITH AN ATTORNEY OR DEPUTY**

If staff are made aware that a patient has an attorney or deputy, particularly regarding health and welfare, this information must be reported to the most senior health professional involved in the patient's care.

The senior health professional must

- attempt to make contact with the attorney or deputy and ask to see the lasting power of attorney/court order

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- satisfy themselves that the LPA is registered by inspecting the document and ensuring that it has been stamped on every page by the Office of the Public Guardian
- with the consent of the attorney, take a copy of the LPA or court order and file it in the patient's notes
- understand the powers that have been conferred on the attorney/deputy
- make arrangements to inform other health professionals involved in the patient's care that the patient has an attorney or deputy together with details of the authority the attorney/deputy has

Examples of registered LPAs can be found here -

<https://www.gov.uk/government/publications/lasting-power-of-attorney-valid-examples>

Examples of court orders appointing a deputy can be found here -

<https://www.gov.uk/government/publications/deputy-court-order-valid-example>

If health professionals decide to provide treatment and care to the patient, they must

- in the case of a health and welfare LPA, assess whether or not the patient has mental capacity to give or refuse consent to the treatment. If the patient has capacity, then the patient will make the decision
- consider whether this treatment and care falls under the authority of the attorney/deputy
- seek consent for the treatment and care from the attorney/deputy, if the attorney/deputy has the authority to take the decision. Refusal must be respected. Where appropriate (i.e. if written consent would normally be obtained from the patient if they had mental capacity to do so), complete (Consent) Form 4. If the decision does not need to be formally documented on (Consent) Form 4, ensure that the attorney/deputy's consent is recorded in the patient's notes.
- if the attorney/deputy does not have the authority to take the decision, then the health professional will need to make a best interests determination. The attorney or deputy must be consulted as part of this determination, where practical and appropriate.

## **10. LPAS/CADS AND ADVANCE DECISIONS TO REFUSE TREATMENT**

An attorney cannot consent to treatment if the donor has made a valid and applicable advance decision to refuse a specific treatment. But if the donor made an LPA after they had made an advance decision, and gave the attorney the right to consent to or refuse the treatment in question, the advance decision will no longer be valid and applicable. For more information about advance decisions, please refer to section 11.8 of the Consent to Examination or Treatment Policy.

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Note that neither a CAD nor the Court can overturn a valid and applicable advance decision. A CAD, therefore, has no authority to consent to treatment that is the subject of a valid and applicable advance decision.

## **11. DISAGREEMENT/DISPUTE WITH THE ATTORNEY/CAD**

In the event that health professionals believe that an attorney or a CAD is not acting in a person's best interests, the Mental Capacity Act Manager must be informed and a decision will be made about whether advice should be sought from the Office of the Public Guardian (OPG).

In the event that an attorney of a health and welfare LPA with the authority to refuse life-sustaining treatment does refuse such treatment and health professionals do not feel that this is in the best interests of the patient, legal advice must be sought immediately (via the on-call senior manager if out-of-hours).

Information about the OPG can be found here -

<http://www.justice.gov.uk/about/opg.htm>

Contact details are

Office of the Public Guardian  
PO Box 16185  
BIRMINGHAM  
B2 2WH

Tel. 0300 456 0300

Mon, Tues, Thurs, Fri – 9.00am – 5.00pm  
Wed – 10.00am – 5.00pm

Fax. 0870 739 5780

## **12. AUDIT**

Adherence to this procedure will be monitored by a variety of processes, including structured and ad-hoc case note review and as part of the UHB and Clinical Board/Directorate clinical audit plan.

Related clinical audit activity which may include monitoring compliance with this procedure, will be reported to Clinical Board Quality, Safety and Experience Groups and the UHB Mental Health and Capacity Legislation Committee.

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### **13. DISTRIBUTION**

This procedure will be made available on the UHB intranet, Clinical Portal and internet sites.

### **14. REVIEW**

This procedure will be reviewed every 3 years or sooner if appropriate.

## **APPENDIX A**

### **Useful contact details**

Julia Barrell, MCA Manager, Tel. 029 2074 3652 (for both consent and mental capacity issues)

Maria Roberts, Patient Safety Team Manager, Tel. 029 2074 6387

Graham Shortland, Medical Director, Tel. 029 2074 2130 (Executive Lead)

Peter Welsh, Director of Governance / Board Secretary, Tel. 029 2074 5544 (in relation to obtaining Legal Advice)

Out of hours legal advice/guidance in emergency situations, via the On Call Senior Manager rota