

## **HELP – I NEED THE POWER OF AN ATTORNEY!**

If you can no longer manage your own affairs and have not granted a Lasting Power of Attorney, then an application to the Court of Protection may be necessary. The Court of Protection exists to protect the property and financial affairs of people who lack mental capacity and to make decisions relating to their health and welfare. The Court's jurisdiction extends to England and Wales. Separate arrangements exist for Scotland and Northern Ireland.

### **WHEN WILL THE COURT OF PROTECTION BECOME INVOLVED?**

The Court of Protection will become involved if something needed to be done, either to protect someone's assets or to enable them to be used for their benefit e.g. if a client owns their own home but are unlikely to return to it, then it may be necessary to sell the property so that the proceeds may be used for their benefit.

The Court should also be involved in decisions relating to serious medical treatments such as the proposed withholding of withdrawal of artificial nutrition and hydration from a patient in a permanent vegetative state, or cases involving organ donation by a person who lacks capacity to consent. The Court of Protection can also be involved where there is an issue over the validity or use of an LPA.

### **THE POWERS OF THE COURT OF PROTECTION**

The Court of Protection can make a declaration on whether a person has mental capacity to make a particular decision. If the Court decides a person does not have capacity, it can make decisions and orders on financial or welfare matters affecting the person.

If there is an ongoing need for decisions to be made on behalf of a person without capacity, the Court may appoint a Deputy to make those decisions. The system of Court appointed Deputies was introduced by the Mental Capacity Act to replace the previous system of Receivers. If you were a Receiver, you should have been contacted by the Office of the Public Guardian to notify you of the change and explain what this means to you. Receivers are called Deputies from 1<sup>st</sup> October 2007, but there will be no change to the powers they have.

The court can make declarations on the validity of an LPA and can end an attorney's appointment and /or cancel the LPA if the attorney's duties are not being carried out in the best interests of the Donor.

## **DEPUTIES**

The Court of Protection has the power to appoint a Deputy if there is no LPA or EPA in place. The Court make an order giving the Deputy authority to act and make decisions on behalf of the person without the capacity. The powers given to the Deputy should be as limited in scope and duration as possible.

The Deputy must be someone who is trustworthy, and has the necessary skills to carryout their duties. It will usually be a family member or friend of that person if they are willing to take on the role, but the Court can appoint an independent professional Deputy (such as a solicitor) if this is considered to be in the person's best interests.

## **ROLE AND RESPONSIBILITIES**

A Deputy has a duty to follow the principles of the Mental Capacity Act. They must:-

- always make decisions in the person's best interests;
- take all practical steps to help the person make the decision themselves;
- allow the person to make the decision themselves if they have the capacity to do so;

- only make decisions that they are authorised by the Court to make.

The powers granted by the Court of Protection to a Deputy cease on the death of the client. The Deputy does not have authority to deal with the client's estate.

## **INDEPENDENT MENTAL CAPACITY ADVOCATE**

The Mental Capacity Act creates a new service called the Independent Mental Capacity Advocate (IMCA) service. This is a service to support and represent people who lack the capacity to make important health and welfare decisions themselves and who have no family or friends who are willing and able to be consulted about the decision.

An IMCA is an independent person who must have the relevant experience and training for the role.

The role of the IMCA is:-

- support and represent the person who lacks capacity when it is being decided what is in their best interest;
- find information to help assess what is in the person's best interests. This could be information about their feelings, values and beliefs;
- or it could mean finding out if there is anyway of helping the person to make or communicate their own decisions;
- challenge decisions which may not be in the best interests of the person.

An IMCA must be instructed if a decision has to be made about:-

- serious medical treatment; or

- a long term stay in hospital or a care home (long term means longer than 28 days in hospital or 8 weeks in a care home); or
- a move to a different hospital or care home.

An IMCA may be consulted in relation to decisions concerning care reviews or in adult protection cases.

If a decision is needed urgently, it may not be possible or appropriate to instruct an IMCA. If the urgent decision relates to a move of accommodation, an IMCA must be instructed as soon as possible after the move.

It is the Local Authority or NHS organisation providing the person's care or treatment which is responsible for instructing the IMCA. They must take into account the representations and information provided by the IMCA when deciding what is in the person's best interests.

The IMCA Service is only appropriate for people who have no-one else to support or represent them (other than paid staff). If someone has family or friends who are willing to be consulted, or has set up a Health and Welfare LPA, or has a Court appointed Deputy, it would not be necessary for an IMCA to be instructed.

### **ACTION**

If you have any queries regarding this article, or indeed if you require any advice or assistance on Lasting Powers of Attorney documents; Wills; Estates or Trusts, please do not hesitate to contact me at **Busbys**. Ring **01288 35 9000** or email me at **sharon.piper@busbyslaw.co.uk**. We are here to help.

**Sharon Piper,**  
**Trust and Estate Practitioner.**