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LAW FIRM

MENTAL HEALTH AWARENESS WEEK

18 – 24 MAY 2020

Fluctuating Mental Capacity

This week marks the start of Mental Health Awareness Week running from 18–24 May 2020, with a particular focus upon the power and potential of kindness.

Given the current situation surrounding coronavirus and social distancing, it is more important than ever to take care of our mental health and it goes without saying that COVID-19 has taken a lot of us by surprise, disrupting life's usual rhythms, perhaps more akin to an episode of Black Mirror.

Infectious disease outbreaks can be frightening and can affect our mental health. More of us will be spending time at home and many of our regular social activities will no longer be available to us for the foreseeable future. With that being said, we have seen the amazing acts of kindness undertaken during these unprecedented times, epitomised by Captain Tom Moore being the embodiment of kindness and generosity, raising over £33m for NHS charities.

Over the course of this week I will be addressing a number of key issues surrounding the importance of not only taking care of our mental health, but also various topics in relation to Mental Health and Capacity from the perspective of Wills and Probate to Lasting Powers of Attorney and Deputyships.

Fluctuating Capacity

Sometimes society tells us to always be happy, and that showing sadness is a sign of weakness. **This is far from true – it is okay not to be okay. We all have good days. We all**

have bad days. This can vary in its extremes, especially where mental health issues are concerned.

Fluctuating capacity is where a person's decision-making ability can vary. A person may lack capacity at the time of a mental health assessment, but the result may be different on a second assessment following a lucid interval. Similarly, mental capacity may be present for some types of decisions, but not for others. Therefore, capacity is both decision-specific and time-specific.

The test for capacity is set out in the Mental Capacity Act 2005 ("the Act") and states that "[a] person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter, because of an impairment of, or a disturbance in the functioning of, the mind or brain".

A person's inability to make a decision means that the person is not able to:

- understand the information relevant to the decision;
- retain that information;
- use that information as part of the process of making the decision; and/or
- communicate their own decision.

Whilst the test for capacity appears to be relatively straightforward, in reality, the assessment of capacity can be very difficult, especially for borderline cases. From a practical perspective, people can be aware that they are beginning to lose mental capacity, be it more frequent moments of forgetfulness, changes in personality or temperament or general confusion and distress - to see this in a loved one can be very distressing and a difficult issue to approach and talk about. It is key, however, to always have that person's best interests at the forefront of your mind when considering how best to deal with the matter.

Fluctuating capacity can also have wide reaching implications and can be a major concern for legal, health and social care professionals. It is simply not a case of black versus white; however, the presumption is that someone has mental capacity unless it can be proven that they do not.

It is therefore important to consider putting in place advanced statements, decisions and Powers of Attorney in order to create the necessary safeguards in the event that you should lose mental capacity. Yes, it can be difficult to think about the future, but putting plans in place now can make matters easier for loved ones should the worst happen.

Over the course of this week, I will be looking into the importance of putting in place these necessary safeguards, looking into the potential pitfalls of not doing so, and steps that you can take now in order to plan ahead.

Tomorrow I will be looking at being appointed as an Attorney under either an Enduring Power of Attorney (EPA) or a Lasting Power of Attorney (LPA) and what you have to do if you are appointed to act.

> **Let's shape a society that tips the balance in favour of good mental health, for all of us, but especially for those who are most vulnerable.**

If you would like to discuss lifetime planning with our Private Client Team, please do not hesitate to get in touch with me on 0191 232 8345 or email me at tom.bridge@hay-kilner.co.uk for further information.

LPAs and Planning Ahead

It goes without saying that people are living longer as a consequence of medical advances, but an increasing number of individuals sadly lose the ability to make important decisions in relation to their money and personal welfare.

Yesterday I looked at the difficulties in assessing mental capacity, especially for people whose mental capacity can fluctuate. As stated in yesterday's article, it should be assumed that an individual has capacity to make their own decisions unless it can be established that they do not. This is usually undertaken by a medical professional who will undertake an assessment of capacity - different assessments may be needed for different decisions if a person's capacity fluctuates.

Today, I will explore the importance of putting in place Powers of Attorney and what will be required of you if you are appointed to act as an Attorney.

Powers of Attorney

In order to put in place a Power of Attorney, you need to have mental capacity. A Power of Attorney is a legal document that allows you (the "Donor") to appoint another person or persons (an "Attorney") to act on your behalf if you are unable to make decisions yourself.

It is important to know that there are different types of Power of Attorney: Enduring Powers of Attorney ("EPAs") and Lasting Powers of Attorney ("LPAs").

EPAs were a forerunner to LPAs and were strictly limited to your financial affairs and will not cover health decisions. They enabled the donor to appoint an Attorney to look after their affairs, even if the donor still has mental capacity. If the donor begins to lose or has lost mental capacity, then the EPA is then registered and the Attorney can then continue to act on their behalf.

EPAs can no longer be put in place, however, if you made an EPA prior to 1st October 2007, it will remain valid. It is worth reviewing any EPA you may have entered into in the past to ensure that the Attorneys you appointed are still appropriate, able and willing to act for you if required.

LPAs, on the other hand, were introduced by the Mental Capacity Act 2005 to replace EPAs, largely because EPAs were prone to abuse by unscrupulous Attorneys.

There are two types of LPA:

1. Property and Financial Affairs LPA; and
2. Health and Welfare LPA.

Property and Financial Affairs LPA

The Property and Financial Affairs LPA allows your Attorney(s) to deal with your financial affairs, for example, to pay your bills, sell your property or investments and operate your bank accounts.

You allow your Attorney(s) to use your LPA while you still have capacity to make financial decisions yourself. If you allow your Attorney to make decisions before you have lost mental capacity, it does not mean that they automatically take all financial decisions for you, it just means that they can take these decisions if you require their assistance sometime in the future. This can be helpful if you are physically unwell or on holiday for an extended period of time. Of course, this authority will extend to when you have lost mental capacity too.

Health and Welfare LPA

This type of LPA allows your Attorney(s) to make decisions about matters such as your medical treatment, your diet, where you live and how you spend your time. Unlike the LPA for property and financial affairs, your Attorney(s) can only use it when you have lost the mental capacity to make decisions yourself.

Your Attorney(s) cannot make decisions about life-sustaining treatment unless you specifically allow this in the LPA. Life-sustaining treatment can include ventilation to help with breathing, feeding through a tube and resuscitation. Again, however, it is specific to the facts and can include something as simple as administering antibiotics or something like pneumonia (or refusing such treatment, as the case may be).

Advance Decisions

Prior to the Mental Capacity Act 2005 and LPAs, it was not possible to make health decisions under an EPA, and the alternative was to put in place an advance decision (or a living Will). This is where an adult makes the decision, whilst they still have capacity, to refuse the giving or continuing of specific medical treatment in the future when they have lost capacity. There are sometimes known as advance decisions to refuse medical treatment (ADRT).

Whilst advance decisions can still be put in place, there are, however, not without their limitations. A decision-maker cannot use an advance decision to require a healthcare professional to provide particular medical treatment, and therefore there is no compulsion to treat under an advance decision. Similarly, they cannot be used to refuse actions needed to keep the decision-maker comfortable (such as basic or essential care).

If you have an advance decision in place, it is important that your family and healthcare professionals are informed of it and it should be reviewed regularly to ensure that it meets your needs, and if it does not, it can be amended or withdrawn, provided you have the necessary mental capacity to do so.

How are Attorneys appointed?

Under both types and LPA, and under an EPA, if there is more than one Attorney is appointed they can act *jointly* or *jointly and severally*. Attorneys appointed *jointly* must all agree and always act together – this can potentially cause some difficulties if an Attorney dies and no replacement has been appointed and consequently make the LPAs and EPA unusable.

Where Attorneys are appointed on a *joint and several* basis, Attorneys can act together, but they may also act independently. If one of the Attorneys dies, the surviving Attorney will still be able to continue to act as an Attorney.

What happens when the donor dies?

When the Donor dies, both types of LPA and an EPA automatically come to an end. The original Power of Attorney should be sent to the Office of the Public Guardian together with a death certificate (or to the solicitor handling the estate).

The importance of putting in place Lasting Powers of Attorney should not be underestimated.
Tomorrow I shall be looking into what happens when you lose mental capacity and no Power of Attorney has been put in place, the role of the Court of Protection and appointing Deputies.

If you would like to discuss Powers of Attorney with our Private Client Team, please do not hesitate to get in touch with us on 0191 232 8345 or email Tom Bridge at tom.bridge@hay-kilner.co.uk for further information.

We have a team of solicitors with specialist expertise in relation to all types of Power of Attorney who can advise on the preparation, execution and registration of these documents.

Deputyships

In the UK, one in six of us over the age of 80 have dementia, and as we live longer the number of cases sets to increase. Whilst conversations with senior members of your family about their thoughts and wishes for care in later life might be difficult, perhaps Mental Health Awareness Week could be the perfect opportunity to trigger these conversations – when it comes to planning for the future, it is important that we make a choice, not take a chance.

Yesterday I looked at the importance of putting in place Lasting Powers of Attorney in the event that an individual loses mental capacity; they're a little like an insurance policy - you

hope you'll never need it, but it's invaluable when you do. But what happens when a Lasting Power of Attorney is not in place and you lose mental capacity?

In the absence of having a valid Power of Attorney in place, a friend, family member of professional can apply to be appointed as a Court of Protection deputy to look after the affairs of an individual if, as a consequence of not having mental capacity to do so, they are unable to do so make decisions on their own. These decisions can cover the individual's property, financial affairs and health and welfare.

Deputyship applications are, by their very nature, arduous, time-consuming and expensive. However, they may be required in the absence of having a valid Lasting Power of Attorney in place.

The Court of Protection is a specialist Court which looks after individuals who lack capacity to make decisions for themselves. It is the Court of Protection who ultimately decides if an individual does not have capacity.

From a practical perspective, medical advice regarding an individual's capacity, or lack thereof, will be sought from a medical professional, which is then presented to the Court as evidence. If such advice shows an individual lacks mental capacity, then such evidence will be persuasive to the Court.

Who can be appointed as a Deputy?

Anyone over the age of 18 can be appointed to be a Deputy; however, ordinarily the Court of Protection would appoint a family member or close friends, depending on the individual's personal circumstances. It is unusual that the Court would appoint a stranger unless the person in question was a professional deputy.

What does a Deputy do?

A Property and Financial Affairs Deputy looks after someone's financial affairs. This includes paying bills and dealing with bank accounts to selling that person's house (subject to Court permission) if it is in their best interests to do so. The Court of Protection can also made orders in relation to specific Health and Welfare issues, including but not limited to, where a protected party should live, who they should live with and their care arrangements.

Unlike an Attorney acting under an LPA, a Deputy is required to account to the Office of the Public Guardian in relation to major decisions made in a deputyship period on a yearly basis. When compared to acting under an LPA, the process of doing so can appear more arduous and taxing on a Deputy.

Hay & Kilner LLP act as professional deputies and attorneys for a large number of clients, particularly in cases where our Clinical Negligence and Accident Compensation teams recover substantial amounts of money for clients who lack capacity; where families do not wish to undertake the role themselves; and where there is a dispute as to who in the family should be appointed.

For further information or advice in relation to Deputyships, please contact Tom Bridge on 0191 232 8345 or email tom.bridge@hay-kilner.co.uk

Work-Life Balance and Business LPAs

The pressure of an increasingly demanding work culture, coupled with the cumulative effect of increased working hours, is a pressing challenge to the mental health of the workforce in the UK.

Within our places of work, and within our social networks, there will be individuals living with mental health problems, keeping their heads above water but staying afloat nonetheless.

One in six of us will experience a mental health problem in any given week and with the theme of kindness being pervasive throughout this week's Mental Health Awareness campaign it may just be worth picking up the phone or dropping an email to a friend or colleague, just to make sure that they are doing okay, especially during this difficult period of lockdown.

As a business owner, whether you are a sole trader, partner or company director, it is important to consider who would deal with the financial affairs of your business and ease day-to-day management should you become unable to make commercial decisions yourself.

With regards to business continuity planning and crisis management, who would authorise the payment of invoices, negotiate business contracts or service business loans if you had an accident or had a medical condition that incapacitated you?

If you own a business and lose mental capacity the consequences could be far-reaching for your business.

In order to protect the interests of you as the business owner, together with those of the business, a simple solution is to make a Lasting Power of Attorney ("LPA"). I have already touched upon LPAs generally in my previous articles this week, however, it is hugely important to obtain appropriate advice when planning for the future, both with regards to personal and business matters, especially when the two are not mutually exclusive, as is the case with family businesses.

Whilst appointing a spouse as attorney under an LPA may be appropriate to make decisions about personal matters, they may not be the best person to make decisions with regards to business interests. A business partner, co-director or co-shareholder may instead be better suited to make decisions relating to the business.

One way to deal with this is to therefore consider entering into two LPAs, one limited to making decisions about business interests, and another for all other financial decisions, allowing the most appropriate person to be appointed to make the respective decisions.

Business LPAs may also assist in combatting various crisis scenarios such as having a delayed flight due to events outside your control (such as the coronavirus), or if you had an accident

abroad, leaving you in a hospital bed where you were in no fit state to make business decisions.

Where a business owner lacks mental capacity and no business LPA is in place, it is likely that an application to the Court of Protection will be required in order to appoint a Deputy.

An application will not only prove costly, but is likely to take a significant amount of time, exposing the business to various risks as there is unlikely to be an individual who can make key decisions on behalf of the business during this period; contracts may be lost if no one has authority to negotiate or sign on behalf of the business, paying invoices or wages may become difficult and the business owner's family may become directly affected if they are reliant on income from the business.

Sole Traders

If you are a sole trader, your business is unlikely to have a separate legal entity from you. As such, appointing an attorney under a business LPA will be a useful way of dealing with business continuity and crisis management in the event that you are mentally incapacitated.

Partnerships

If you are a partner in a partnership it is important to check the terms of the partnership agreement to see whether there are any provisions dealing with a partner becoming incapacitated. If this is the case, an LPA may not be required. However, if no such provision exists, and you decide to implement a business LPA, it is important to take professional legal advice to ensure that the business LPA does not conflict with any other aspects of your partnership agreement.

Company Directors

As with partnerships, it is important to check the company's articles of association if you are a director of a company. Often, and in order to protect the company's interests, the articles of association would provide for the termination of a company directorship due to a loss of mental capacity. If there is no such provision, it is important that you seek legal advice and consider including this as a provision within the company's articles of association.

On the other hand, if you are the sole director of a small private company, it is unlikely that the articles of association will terminate the director's appointment; otherwise there would be no one to run the company. In such circumstances, it would be appropriate to consider a business LPA.

If you decide to put in place an LPA it will need to be registered with the Office of the Public Guardian. Once registered the attorneys will have power to enter into transactions that are within the ambit of the LPA so that they can effectively deal with business decisions if you are unable to do so.

Whilst you are still mentally capable, your attorneys should only do what you authorise them to do, and it is only when you become mentally incapable that your attorneys will be

able to make decisions on your behalf. It is therefore important to consider giving specific detailed instructions to your attorneys in relation to the powers they would hold.

At Hay & Kilner, a multi-disciplinary approach can be taken between our expert advisers within the Private Client and Corporate departments of the firm when advising business owners about both their personal and business affairs.

For more information on any of the above, or how we can help you or your business, please contact Tom Bridge at tom.bridge@hay-kilner.co.uk or on 0191 232 8345.

Statutory Wills

Let's make choices, not take chances; and for those that do not have the necessary mental capacity to deal with their own affairs, it is hugely important that we put in place safeguards to ensure their affairs are in order should the worst happen.

Where a vulnerable individual lacks the mental capacity to make a Will the Court of Protection may authorise a Statutory Will to be executed on their behalf. Whilst it is possible for some decisions to be made through a Lasting Power of Attorney, other decisions, such as putting in place a Statutory Will, must be made by the Courts.

The Mental Capacity Act 2005 sets out the current statutory framework for executing Statutory Wills in the Court of Protection.

Before an application for a Statutory Will is made to the Court of Protection, it is important to establish whether the person has testamentary capacity to do so; that is, the capacity to make a valid Will.

The test for testamentary capacity is set out in the case of *Banks v Goodfellow (1870)* which states that an individual will have testamentary capacity if they are capable of understanding:

1. the nature and effect of making a Will;
2. the extent of his or her estate; and
3. the claims of those who might expect to benefit from their Will.

If an individual who lacks capacity requires a Will an application to the Court of Protection may be required if they do not have the testamentary capacity to put in place a Will.

To make a Statutory Will, a number of application forms and statements supporting the terms of the Will need to be made. The application is then made to the Court of Protection who will make a decision as to whether the Will is appropriate.

If a Statutory Will is not made for an individual who lacks capacity and no previous valid Will was in place, then their estate will pass under the Intestacy Rules and the law will govern to whom their estate will pass. This may mean that as an Attorney or a Deputy you may end up

playing at the intestacy roulette wheel – meaning that certain people may, or may not, benefit from a the incapacitated individual's estate.

Therefore, making a Will (or a Statutory Will, if appropriate to the circumstances) is the best way to combat any unintended consequences of the Intestacy Rules.

For more information on any of the above, or how we can help you, please contact Tom Bridge on 0191 232 8345.