Next of Kin: Understanding decision making authorities
If you have a particular preference or view about a type of treatment it is possible to make an advance decision to refuse this. This is called an Advance Decision in the Mental Capacity Act 2005. It is sometimes referred to as a 'living will' however this is not a legal term as a will only really applies after someone’s death.

Under the Mental Capacity Act 2005 these types of decisions have legal status. An advance decision can only be made by a person if they are over the age of 18 and have capacity to make that decision. They must state which treatment they are refusing and the decision can be changed/amended at any time by the person themselves. Health and social care professionals seeking to provide treatment once the person has lost capacity to make the decision will need to check whether a decision exists, if it does is it valid (i.e. the person has not altered the decision) and if it is applicable to the treatment being proposed.

A valid and applicable advance decision to refuse treatment has the same effect as the person making the decision themselves at the time it needs to be made.

More guidance is available to support professionals and carers think about whether an advance decision applies in Chapter 9 of the Code of Practice which accompanies the Mental Capacity Act 2005.
### Lasting Powers of Attorney

Before the Mental Capacity Act 2005 (MCA) was introduced, there was an arrangement called an Enduring Power of Attorney (EPA). These are now less common, but there are still a number in existence. These relate to financial and property matters only and do not enable anyone to make decisions on your behalf in relation to any care and treatment matters. The MCA created a new system by which a person could select who they want to make decisions on their behalf and the decisions which they have authority to make; these are called Lasting Powers of Attorney (LPA). Your next of kin does not have legal decision-making authority without an EPA or LPA (unless they have been appointed by the Court of Protection). This creates a legal decision-making authority that would not exist for your next of kin otherwise.

There are two types of LPA, one for property and affairs, including finances, and one for health and welfare, including medical treatment and accommodation issues. For an LPA to be valid it must be registered with the Office of the Public Guardian (OPG). Where an LPA has been signed but not yet registered before the person loses the capacity to make this decision it may still be registered with the OPG if it can be demonstrated the person did have capacity at the time of signing. We recommend seeking advice from the OPG or the supporting solicitor where one was involved if this is the case.

While you can register an LPA with the OPG without legal advice, you may wish to use a solicitor to provide independent advice to ensure your interests are protected and that the LPA is correctly registered with the OPG. In these cases you can expect to pay around £200-£300 for the advice.

It costs £110 to register an LPA with the OPG so if you make one for property and affairs and one for health and welfare you would pay £220.

For more information, please refer to Chapter 7 of the MCA Code of Practice or visit the government website at https://www.gov.uk/power-of-attorney/register for details on how to make and register an LPA.

### Court of Protection and Court Appointed Deputies

If a person lacks capacity to make a particular decision and they have not made an LPA or advance decision, it may be necessary to apply to the Court of Protection to make the decision in the person’s best interests. Where a number of decisions need to be made on an ongoing basis the Court may appoint a Deputy to act on that person’s behalf. A Deputy may be a family member, a professional (such as a solicitor or accountant) of the relevant local authority.

For more information, please refer to Chapter 8 of the MCA Code of Practice or visit the Court of Protection website at https://www.gov.uk/courts-tribunals/court-of-protection for more details on making an application to the Courts.

Daisy Bogg and Professor Keith Brown, May 2016
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