

Chapter 31: Representatives for young people, and parents of children, lacking mental capacity

Introduction

- 1.1. This chapter relates to young people who lack capacity at the relevant time, and also to parents of a child where a parent¹ lacks capacity at the relevant time. Young people, and parents, can use a representative to act on their behalf when exercising rights under the Act if they lack capacity. This chapter also explains who can be a representative for that parent or young person.
- 1.2. The definition in the Act² for young people and parents lacking capacity is taken from the Mental Capacity Act 2005³. It means a person who lacks the capacity to make a particular decision or take a particular action for themselves at the time the decision or action needs to be taken.
- 1.3. Whether a young person, or a parent of a child, has capacity or not, they can still make significant contributions when decisions are being made about their or their child's ALN and **must**⁴ be provided with information and support to enable them to participate in those decisions (see Chapter 4). The general duty⁵ to have regard to the following still applies:
 - their views, wishes and feelings,
 - the importance of them participating as fully as possible in decisions; and
 - the importance of them being provided with the information and support necessary to enable participation in those decisions.
- 1.4. The Young people, and parents of children, lacking capacity Regulations made under section 83 of the Act, set out how representatives can be used to exercise the rights of young people, and parents of children, who lack capacity, and who can act as a representative in the context of the Act.

Assessing mental capacity of a young person or parent

- 1.5. A young person or parent who lacks capacity will usually have already been identified as such, for example by NHS or education professionals in the case of a young person.⁶
- 1.6. Those with a role in determining capacity **must** consult the Mental Capacity Act 2005 and its Code of Practice, which provides guidance on how to

¹ References in this chapter to "parents" refer to a parent of a child, where that parent lacks capacity.

² Section 83 of the Act.

³ Section 2 of the Mental Capacity Act 2005.

⁴ Section 6 of the Act.

⁵ Under section 6 of the Act.

⁶ For children who lack capacity, see Chapter 30 on case friends.

assess whether someone has the capacity to make a decision, and suggests when professionals should be involved in the assessment.⁷

1.7. The Mental Capacity Act 2005 sets out five key principles⁸.

- A person must be assumed to have capacity unless it is established that they lack capacity
- A person is not to be treated as unable to make a decision unless all practicable steps to help them to do so have been taken without success
- A person is not to be treated as unable to make a decision merely because they make an unwise decision
- An act done, or decision made, for or on behalf of a person who lacks capacity must be done, or made, in his best interests
- Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

Representatives for young people and parents lacking capacity

1.8. Where a young person or parent lacks the capacity to exercise a particular right under the 2018 Act, such as make a decision or receive information regarding an ALN matter, that right may be exercised on their behalf by a representative⁹.

1.9. The Young people, and parents of children, lacking capacity Regulations, provide that where a child's parent lacks capacity all references to the child's parent are to be read as references to a representative of the parent¹⁰. The regulations also provide that where a young person lacks capacity, the references to the young person are to be read as references to the young person's representative, or to the young person's parent¹¹. For example, a representative can, on behalf of a young person or parent who lacks capacity:

- Request the local authority responsible for the child or young person to reconsider decisions made about whether the child or young person has ALN¹²;
- take forward an appeal to the Education Tribunal¹³;
- receive information, documents and notifications of decisions, including a copy of an IDP¹⁴;

⁷ Mental Capacity Act Code of Practice

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/497253/Mental-capacity-act-code-of-practice.pdf

⁸ Section 1 of the Mental Capacity Act 2005

⁹ Regulation 3 and 5 of the Young people, and parents of children lacking capacity Regulations.

¹⁰ Regulation 3

¹¹ Regulation 4

¹² Regulation 5(1)(k)

¹³ Regulation 9

¹⁴ Regulation 3 and 5 of the Young people, and parents of children lacking capacity Regulations.

- engage in the arrangements made by a local authority for the avoidance and resolution of disagreements¹⁵;
- request independent advocacy services. Where such a request has been made, the local authority **must**¹⁶ refer that representative to an independent advocacy service.

Who can be a representative

- 1.10. Representatives for young people or parents lacking capacity may be one of the following¹⁷:
- a) a **deputy**¹⁸, appointed by the Court of Protection to make decision on behalf of the parent or young person. Deputies are bound by the terms of the order of appointment, issued by the Court of Protection;
 - b) a **donee of lasting power of attorney**¹⁹ (LPA), appointed by the parent or young person to make decisions on behalf of the parent or young person, which includes giving them the authority to make decisions in circumstances where the person no longer has capacity;
 - c) an **attorney with an enduring power of attorney**²⁰ (EPA); or
 - d) the young person's parent²¹, where the young person does not have a representative listed in (a), (b) or (c) above.
- 1.11. Representatives can be used on behalf of young people or parents who lack capacity to exercise their rights under the Act. When a representative is used, references in the Act to a parent or young person should generally be read instead as a reference to their representative, in accordance with the regulations.
- 1.12. A representative is expected to meet certain criteria and specific duties when appointed by the Court of Protection or appointed as a donee of lasting power of attorney or an enduring power of attorney²². In the case of a parent representing a young person, the general principles of supporting the young person to make their own decisions, and taking actions and making decisions in their best interest, still applies.

¹⁵ Regulation 7 of the Young people, and parents of children lacking capacity Regulations.

¹⁶ Regulation 8 of the Young people, and parents of children lacking capacity Regulations.

¹⁷ Regulation 2 (a-d) of the Young people, and parents of children lacking capacity Regulations.

¹⁸ Regulation 2(a) of the Regulations above and section 16(2)(b) of the Mental Capacity Act 2005.

¹⁹ Regulation 2(b) of the Regulations above and section 9 of the Mental Capacity Act 2005.

²⁰ Regulation 2(c) of the Regulations above and Schedule 4 to the Mental Capacity Act 2005.

²¹ Regulation 2(d) of the Regulations above.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/497253/Mental-capacity-act-code-of-practice.pdf