Bournemouth University

The National Centre for Post-Qualifying Social Work and Professional Practice

National Mental Capacity Forum

Next of Kin: Understanding decision making authorities

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The term 'Next of Kin' is often used in Health and Social Care as a euphemistic shorthand for 'Who is the person we communicate with about you and who do we contact when you are dead?'

In law the term has no status when you are alive - it is misleading too because it does not clarify if this is the person who is your nearest relative or the person most important to you. Indeed, these are often different people.

This helpful leaflet clarifies how people can plan ways, with those they love, to ensure their wishes are taken into account if through illness they cannot take decisions for themselves. I cannot stress enough how important it is to plan ahead and let our wishes be known, in the event we cannot express them.

As Chair of the National Mental Capacity Forum I commend this advice leaflet; we all want the best care provided in accordance with our wishes and this leaflet helps everyone understand how to ensure that happens.

Baroness Ilora Finlay.

Next of Kin (NoK)

The term Next of Kin (NoK) is commonly used and there is a presumption that the person you identify as your NoK has certain rights and duties. Health and social care colleagues should always consult the people closest to a person who lacks capacity to understand that person's wishes and feelings to help them make a decision in that person's best interests. However, the person identified as next of kin should not be asked to sign and/or consent to certain interventions (unless they have a legal basis for doing so – see overleaf). This is a mistake often made in many hospital and nursing or residential type accommodations, where family members are asked to sign care plans, end of life plans and other treatment options and provide consent which is not legally valid.

Advance Decisions

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.

Did you know....

- That there is no legal basis for next of kin
- If your loved one is in hospital and unable to consent to treatment, you have no legal right to give consent on their behalf unless certain legal procedures are in place

There is actually only one situation where 'next of kin' is legally valid; this is if you die without leaving a will. In this case, your estate will be passed on to the person or people who are your closest blood relation, also termed as your next of kin.

The Mental Capacity Act 2005 has rectified this problem by introducing a number of ways to ensure your wishes and feelings are considered should a time come when you are unable to make a decision for yourself. Relying on an identified 'next of kin' is not one of those ways.

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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